

Spring 1991

## What's in a Name? The Constitutionality of Multiple "Supreme" Courts

David E. Engdahl

*University of Puget Sound School of Law*

Follow this and additional works at: <https://www.repository.law.indiana.edu/ilj>



Part of the [Constitutional Law Commons](#), and the [Courts Commons](#)

### Recommended Citation

Engdahl, David E. (1991) "What's in a Name? The Constitutionality of Multiple "Supreme" Courts," *Indiana Law Journal*: Vol. 66 : Iss. 2 , Article 3.

Available at: <https://www.repository.law.indiana.edu/ilj/vol66/iss2/3>

This Article is brought to you for free and open access by the Law School Journals at Digital Repository @ Maurer Law. It has been accepted for inclusion in Indiana Law Journal by an authorized editor of Digital Repository @ Maurer Law. For more information, please contact [rvaughan@indiana.edu](mailto:rvaughan@indiana.edu).



**JEROME HALL LAW LIBRARY**

INDIANA UNIVERSITY  
Maurer School of Law  
Bloomington

# What's in a Name? The Constitutionality of Multiple "Supreme" Courts†

DAVID E. ENGDAHL\*

## I. JURISPRUDENTIAL PROLOGUE

American political and legal literature is glutted with discussions of what, for about eighty years, has been called "judicial review."<sup>1</sup> By now, those scholars interested in origins seem satisfied by the accumulated evidence that most thoughtful participants in establishing the 1789 Constitution expected federal judges to exercise the prerogative of declining to apply laws (whether federal or state) that they found offensive to "fundamental" law—part of that "fundamental" law being the new Constitution itself.<sup>2</sup>

---

† © Copyright 1991 by David E. Engdahl.

\* Professor of Law, University of Puget Sound School of Law; LL.B., 1964, University of Kansas; S.J.D., 1969, University of Michigan.

1. According to one source:

"Judicial review," as a term used to describe the constitutional power of a court to overturn statutes, regulations and other governmental activities, apparently was an invention of law writers in the early twentieth century. Edward S. Corwin may have been the first to coin the phrase, in the title of an article in the 1910 *Michigan Law Review*.

R. CLINTON, *MARBURY V. MADISON AND JUDICIAL REVIEW* 7 (1989).

2. By now one should consider ridiculously anachronistic and uninformed the once predominant view (which still persists in some quarters), that "judicial review" was a master craft of Chief Justice Marshall's genius. Classic examples of that view, and some of the more recent studies discrediting it, are summarized in *id.* at 5-7. As history professor Gordon S. Wood has explained:

The sources of such power . . . lie not in any decisions of the Supreme Court, such as *Marbury v. Madison*, or in the legal career of John Marshall, or even in the history of the Supreme Court. . . . The origins . . . lie in the first century and a half of American history, in the colonial period.

Wood, *The Origins of Judicial Review*, 22 *SUFFOLK U.L. REV.* 1293, 1293 (1988). But Wood's short essay barely adumbrates the sources, which include not only alertness to different ranks of positive law attributable to experience with colonial charters and with ordinances subject to homeland review, but also cultural notions of ageless morality or right (akin to medieval English jurisprudence); some faith that judges, freed of dependency on a King or his Governor, could and would know and honor familiar custom; and some unsettling experience with popular legislative assemblies.

That the practice of judges testing positive law against fundamental (including some constitutionally textualized) rights materialized when and in so widespread a manner as it did seems largely attributable to a phenomenon magnificently described by Professor William E. Nelson: the fast escalation in the eighteenth century's last decades of popular sovereignty ideology against a background tradition of governance by shared value consensus. Nelson, *The Eighteenth-Century Background of John Marshall's Constitutional Jurisprudence*, 76 *MICH. L. REV.* 893 (1978). While the same phenomenon contributed to the great party division between

That prerogative, however—which is integral to the judicial independence imported by a concept of checks and balances among separated powers<sup>3</sup>—is not by itself what excites discussion today. The principal controversies concern either the nature and sources of precepts or principles that commentators think judges should deem “fundamental” enough to justify disregarding politically generated law, or the merits of particular social or moral opinions to which some but not others ascribe constitutional status. Most debate, in other words, is not over the practice of judicial review per se, but over how judicial review is practiced today.<sup>4</sup>

Still, it is not sufficiently recognized that whether judges resort to “improper” sources, or “wrongly” ascribe constitutional status to some controversial premise, is much less important than whether and to what extent the rest of us (including other judges) pay heed to them when they do. Past and present debate about judicial review centers almost exclusively on the United States Supreme Court; and the contemporary debate is driven by passionate moral concern that the Supreme Court decide things aright. That it do so, however, can seem so imperative only because it is tacitly assumed that whatever that select body might declare, ipso facto is authoritative dogma by which the entire polity (and most certainly the entire judiciary) is bound.

This tacit assumption sometimes is called “finality”<sup>5</sup> (although “final” in this context clearly means something less than final for all

Republicans and Federalists, that is coincidental: Leading Republicans no less than the Federalists esteemed this judicial practice (although not its extrapolation by some Federalists into judicial “supremacy”). Marshall’s contribution was no more than the systematic articulation of bases for the well-established practice, after well-publicized venting of extreme views on both sides. See D. Engdahl, John Marshall’s Jeffersonian Concept of “Judicial Review” (unpublished manuscript on file with the author).

Important additional insight into the rise of this practice is provided by Reid, *Another Origin of Judicial Review: The Constitutional Crisis of 1776 and the Need for a Dernier Judge*, 64 N.Y.U. L. REV. 963 (1989).

3. See J. AGRESTO, *THE SUPREME COURT AND CONSTITUTIONAL DEMOCRACY* (1984).

What distinguishes [Agresto] from others who have written on judicial review and democracy is that he makes no pretense of reconciling the two. Instead he underscores their inherent conflict, rejects any assertion that democracy can or should be safeguarded in the conflict by judicial “self-restraint,” and suggests serious resort to the “seemingly baroque” scheme of checks and balances.

Engdahl, Book Review, 3 CONST. COMM. 513, 515 (1986) (reviewing J. AGRESTO, *supra*).

4. Perhaps this always has been true, for arguments about the historicity and legitimacy of judicial review seem to have flourished or faded coincident with swells and mutings of articulated dissatisfaction with one or more lines of predominating judicial opinion.

5. “I believe that the real anxiety over judicial review is not its counter-majoritarian nature as such; it is rather the seeming finality of a constitutional pronouncement by the Supreme Court.” Wellington, *The Nature of Judicial Review*, 91 YALE L.J. 486, 499 (1982). A short time later Professor Conkle noted:

[T]he [Supreme] Court considers its interpretations to be final and determinative statements of general law, reversible only by constitutional amendment or by the Court’s own subsequent change of opinion. The Supreme Court essentially equates

time).<sup>6</sup> As she proceeds with this Article, the reader will find interesting the use made of that same word when the judicial branch was constituted two centuries ago. The word "finality" alone, however, is insufficient to distinguish Supreme Court "judicial review," as we indulge it today,<sup>7</sup> from simple res judicata.

The crucial premise underlying contemporary debate about judicial review is that there not only is, *but must be*, a *hierarchy of judicial authority*, so that within a domain that includes all arguably "constitutional" issues the Supreme Court can make ultimate, authoritative and in *that* sense "final" determinations. The Supreme Court itself might reconsider a point, but in no other quarter (it is tacitly assumed) may the authoritative finality of its "constitutional" pronouncements be gainsaid. Upon this attribute of *hierarchical* "finality" all the political power of the Supreme Court now depends.<sup>8</sup>

---

its rulings with the Constitution itself, and the Court's opinions thus represent the "supreme Law of the Land."

This doctrine of judicial finality gives the Supreme Court the final, authoritative word on questions of constitutional interpretation

Conkle, *Nonoriginalist Constitutional Rights and the Problem of Judicial Finality*, 13 HASTINGS CONST. L.Q. 9, 12-13 (1985).

6. Dean Wellington imagined: "The key to mitigating concern with judicial review is found when one analyzes the concept of finality and relates it to the judicial process. [G]rowth, change, and progress are inconsistent with finality in any strong sense" Wellington, *supra* note 5, at 519-20.

However, confidence that the Supreme Court will keep step with society's growth, change and progress requires a faith contradicted by history, which many find insufficient to mitigate their concern over the contemporary practice of judicial review.

7. The modern Supreme Court's most memorable statement of the prerogative it claims now as "judicial review" appears in the opinion individually signed by each of the Justices in *Cooper v. Aaron*, 358 U.S. 1 (1958).

Justices occasionally had shown such arrogance before, as when Chief Justice Taney went beyond any need of the case in *Ableman v. Booth*, 62 U.S. (21 How.) 506 (1858), to boldly proclaim that "the fugitive slave law is, in all of its provisions, fully authorized by the Constitution of the United States." *Id.* at 526. But when he there trumpeted as indispensable to the "very existence" of a national government "that a tribunal should be established in which all cases which might arise under the Constitution and laws and treaties of the United States should be finally and conclusively decided," *id.* at 518, Taney had no better sense than the 1958 Justices of the far more modest judicial prerogative John Marshall had perceived, and had taken pains to explain. Marshall deliberately distinguished between "cases" and "questions," firmly disavowing "final" authority as to any constitutional "question" except solely for the purpose of deciding a particular litigated "case." See, e.g., 10 ANNALS OF CONG. 606, 612-13 (John Marshall's 1800 speech in Congress on the fuss over President Adams and Thomas Nash); see also *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 109-10 (1802) (Marshall's opinion for the Court, in which the case was sub judice simultaneously with the rule to show cause in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)). Also, note carefully the now almost universally neglected sentence that Marshall immediately subjoined to his "province and duty" assertion in *Marbury*, 5 U.S. (1 Cranch) at 177; see also *id.* at 178-79.

8. Defending the substance while excusing the hyperbole of the Court's 1958 pronouncement in *Cooper*, 358 U.S. 1 (1958), Professor Farber argued that "the Court's decisions are at least a form of federal common law" and, as such, "are binding federal law under the

That power might no longer be so secure as it has seemed in the past.<sup>9</sup> Such evidence of intellectual integrity and political neutrality as sometimes has reinforced the Supreme Court's prestige and given to its pronouncements a great moral weight, now is much less apparent—to some because of too many (or too few) eager judicial forays into controversial realms of public policy, and to others because academic theorizing and sophisticated critiques, or popular reporting of what the Justices say and do, has largely discredited the idea that constitutional interpretation does or should (or even can) materially differ from politics at large.<sup>10</sup> Those who most applaud the

---

supremacy clause." Farber, *The Supreme Court and the Rule of Law: Cooper v. Aaron Revisited*, 1982 U. ILL. L. REV. 387, 390. Then he added: "Unlike the Supreme Court's argument in *Cooper*, the argument made here does not rest on any assumptions about the Court's unique role in the constitutional scheme. Instead, it rests only on the Court's position as the highest federal tribunal." *Id.* at 409.

9. "[T]he existence of this doctrine, and the polity's acquiescence to it, seem quite out of character for a society that generally governs itself through elected representatives." Conkle, *supra* note 5, at 13.

[H]ow is it that the people acquiesce in the exercise of broad veto power over acts of their elected representatives by the vote of a majority of nine Justices who are almost completely insulated from electoral control? They acquiesce mainly because most of them cling to the conception that the Justices, constrained by the tradition of their profession and their office, do not consider themselves free to make or remake the law according to their own notions of what is best for the society; they interpret and apply the law as it is given to them from outside sources

L. LUSKY, BY WHAT RIGHT? A COMMENTARY ON THE SUPREME COURT'S POWER TO REVISE THE CONSTITUTION 31-32 (1975).

10. "No more than a passing familiarity with history is required to appreciate that only a very small fraction of contemporary constitutional law corresponds with what can plausibly be considered the historical 'core meaning' of the Constitution, even on the most generous interpretation of that notion." Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033, 1061 (1981). It has become inescapably evident that "[v]irtually all of the constitutional rights recognized by the modern Supreme Court depend at least to some extent on norms not provided by the framers, but drawn instead from some other source of values." Conkle, *supra* note 5, at 9.

In a veritable parade, commentators during the past decade have tendered new, newly refined, newly extrapolated, or newly systematized value sources from which Justices are invited to draw. Constitutional (and principally constitutional rights) "theory" thus seems to preoccupy the erstwhile constitutional "law" professoriat.

Only the most credulous cling any longer to the conception Professor Lusky credited for acquiescence in the Supreme Court's extraordinary power: How could an alert observer pretend any longer that judges are not considered (by themselves and by others) in very large part "free to make or remake the law according to their own notions of what is best for the society"? L. LUSKY, *supra* note 9, at 32. Perhaps Lusky was wrong: Acquiescence might be due to the fact that most people most of the time simply don't care. Yet he might prove prescient in noting that this erstwhile acquiescence "may not always remain so." *Id.* at 27

Should passions be stirred broadly and deeply enough, those who robustly have exposed the nakedness of contemporary Supreme Court power might find themselves fashioning places to hide. Law, after all, is a construct of human minds, imposed on the coalescent mass of human experience to moderate the interplay of competing wills and force. One who contented himself with demonstrating the obviously contingent (hence "political") character of law (and particularly of constitutional law) would not be the purveyor of some profound insight, but a fool.

memorable "good" things accomplished by application of the Supreme Court's political power therefore often exhibit a compulsion to somehow "legitimate" that power. Yet all that really remains to support the hierarchical finality of the Supreme Court is a set of plainly alterable statutes, together with (and this assuredly is the more important) the habit of thinking<sup>11</sup> that *some* body *must* have "the last word."

Occasionally some scholar has elevated this habit to consciousness, whether to suggest some more or less modest alteration of it<sup>12</sup> or to suggest that the "uniformity of interpretation" it is thought to induce is itself some kind of constitutional "background right."<sup>13</sup> I, on the other hand, boldly suggest that this habit of thinking is contradicted by facts readily apparent upon reflection,<sup>14</sup> and is dysfunctional in any event. But for this habit, an array of interesting possibilities could emerge for dealing not only with claimed judicial intrusions into the political realm, but also with such mundane (yet urgent) issues as case load, quality control of work product and case law coherence.<sup>15</sup> Yet the habit still survives—no doubt in large part because it seems that to think otherwise would be to cavil the plain language of the Constitution, which denominates this one tribunal "supreme." And the language certainly does so, . . . does it not?

I am no more an "originalist" now than I was a quarter century ago.<sup>16</sup> Indeed, mine was one of the earlier organized criticisms of the "originalism" premise, even before it had become popular to bandy that name pejoratively.<sup>17</sup> Yet almost all of my constitutional scholarship has been heavily

11. Most citizens, politicians and scholars seem to agree with or acquiesce in the Supreme Court's claim to be the ultimate interpreter of the Constitution. Brest, *Who Decides?*, 58 S. CAL. L. REV. 661, 670 (1985).

12. See, e.g., Conkle, *supra* note 5, at 13.

13. Beschle, *Uniformity in Constitutional Interpretation and the Background Right to Effective Democratic Governance*, 63 IND. L.J. 539 (1988).

14. There are numerous issues of federal law on which the Supreme Court has declined giving the "last word" even when asked. An insightful study of very few of these is Sturley, *Observations on the Supreme Court's Certiorari Jurisdiction In Intercircuit Conflict Cases*, 67 TEX. L. REV. 1251 (1989).

Many of the questions thus left in conflict seem no less important than others the Supreme Court has gone out of its way to decide.

15. For example, after reading this Article one might well reconsider several problems discussed in Hellman, *Jumboism and Jurisprudence: The Theory and Practice of Precedent in the Large Appellate Court*, 56 U. CHI. L. REV. 541 (1989) and Meador, *A Challenge to Judicial Architecture: Modifying the Regional Design of the U.S. Courts of Appeals*, 56 U. CHI. L. REV. 603 (1989).

16. See Engdahl, *Characterization of Interstate Arrangements: When Is a Compact Not a Compact?*, 64 MICH. L. REV. 63, 75 (1965); see also Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. COLO. L. REV. 1 (1972).

17. Engdahl, Book Review, 21 J. LEGAL EDUC. 119, 120-22 (1968) (reviewing *THE RECONSTRUCTION AMENDMENTS' DEBATES* (A. Avins ed. 1967)).

historical. That is partly because I discover again and again the predominance in great doctrinal developments not of any deliberate policy choice, but of simple (or complex) intellectual confusion, and consequently have learned that

[d]iscovering the framers' forgotten intent can destroy the illusion of necessity in an unsatisfactory but long established construction and create the opportunity for a policy choice between alternative constructions. And probably in constitutional law as in other fields of law historical research in an effort to grasp a forgotten understanding can uncover the source of vexatious conceptual errors which the legal mind has hitherto been unable to escape.<sup>18</sup>

And it is partly because, finding words persistent in their capacity to cripple analysis and trick the mind,<sup>19</sup> I think that clear communication depends upon ensuring, so far as possible, that one understands what another (even centuries ago) actually tried to say.

With regard to the latter, more mischievous than any of the errors with which their critics delight in flogging the "originalists" is the propensity to assume that words used in an old document can accurately be understood as importing the same meaning that the same words ordinarily carry today. Not always, but often, quite the contrary is true.

And so it is with the adjective "supreme" as it appears in those parts of the Constitution ordaining the judicial branch.<sup>20</sup>

The proposition that the Constitution *mandates* a single forum of ultimate recourse in disputes as to national (including constitutional) law<sup>21</sup> was the premise of resistance to some of the judiciary proposals put forward during the New Deal era,<sup>22</sup> and has underlain opposition to more recent proposals for judicial reform.<sup>23</sup> This premise continues to be fiercely advanced by

---

18. Engdahl, *supra* note 17, at 122.

19. Justice Cardozo once commented that "[t]he repetition of a catchword can hold analysis in fetters for fifty years or more." Grinnell, *Proposed Amendments to the Constitution: A Reply to Former Justice Roberts*, 35 A.B.A. J. 648, 704 (1949) (quoting Justice Cardozo's remarks on the subject of "catchphrases").

20. U.S. CONST. art. I, § 8, cl. 9; art. II, § 2, cl. 2; art. III, § 1. At the only *other* place it appears in the Constitution, the "supremacy" clause, "supreme" *does* seem to be used in a hierarchical sense. *Id.* art. VI, cl. 2.

21. There were various proposals in the post-war period of the nineteenth century that the Supreme Court be enlarged and sit in divisions. See F. FRANKFURTER & J. LANDIS, *THE BUSINESS OF THE SUPREME COURT* 17 n.124, 81-82 (1928). Neither the details of, nor the arguments against, these unenacted proposals will be considered here.

22. For example, Chief Justice Charles Evans Hughes wrote to Senator Wheeler: "The Constitution does not appear to authorize two or more supreme courts or two or more parts of a supreme court functioning in effect as separate courts." Grinnell, *supra* note 19, at 649.

23. See, e.g., Ratner, *Majoritarian Constraints on Judicial Review: Congressional Control of Supreme Court Jurisdiction*, 27 VILL. L. REV. 929, 956-57 (1982); Sager, *The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 23 (1981); see also Baucus & Kay, *The Court Stripping Bills: Their Impact on the Constitution, the Courts, and Congress*,

modern proponents of Supreme Court innovation.<sup>24</sup>

This Article undertakes to debunk that proposition.

## II. THE PYRAMIDIC MODEL

James Wilson wrote in his *Lectures on Law* two hundred years ago:

According to the rules of judicial architecture, a system of courts should resemble a pyramid. [I]ts summit should be a single point.

[O]ne supreme tribunal should superintend and govern all others.

[Otherwise] different courts might adopt different and even contradictory rules of decision, and the distractions, springing from these different and contradictory rules, would be without remedy and without end.<sup>25</sup>

Wilson was one of the ablest of his generation, and an original Justice of the United States Supreme Court. He had been prominent at the Constitutional Convention, and served on its Committee of Detail. He wrote his *Lectures* within five years after the Constitution was drafted, and during his judicial tenure. Particularly given the "plain words" of article III,<sup>26</sup> therefore, it does seem reasonable to believe that the institution Wilson had helped devise conformed to the model that he described.

Nonetheless, such belief is in error. In fact, Wilson found the federal judiciary of his time so out of conformity with his ideal that elsewhere in his *Lectures* he called it a "very uncommon establishment."<sup>27</sup> His advocacy of the pyramidal model, far from reflecting what then was in place, constituted an argument for fundamental change!

If the federal judiciary of his time so poorly conformed to Wilson's "rules of judicial architecture," one surely must conclude either that it failed to comply with the Constitution's design, or else controvert what seems (at least to moderns) the ineluctable connotation of the words "supreme" and "inferior" used in article III.

The former is dubious for half the members of the Senate committee that drafted the original Judiciary Act<sup>28</sup> had attended the Constitutional Convention, and that committee's chairman, Oliver Ellsworth (the principal draftsman of the Act<sup>29</sup>), even served (along with Wilson) on the Committee

27 VILL. L. REV. 988, 1001 (1982) (quoting the remarks of Judge Bork at the Senate confirmation hearings). From a generation earlier, see 1 W. CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 613 (1953).

24. For example, Justice Brennan, at the Bicentennial Conference on the 1789 Judiciary Act at Georgetown University Law Center in September, 1989, shook his index finger emphatically as he insisted that the Constitution provides for "one Supreme Court."

25. 2 THE WORKS OF JAMES WILSON 495-96 (J. McCloskey ed. 1967).

26. U.S. CONST. art. III, § 1, declares that "[t]he judicial Power shall be vested in one supreme Court, and in such inferior Courts" as Congress might establish.

27. 2 THE WORKS OF JAMES WILSON, *supra* note 25, at 458.

28. Act of Sept. 24, 1789, ch. 20, 1 Stat. 73 [hereinafter Judiciary Act].

29. See Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49 (1923). The Act has been described as Ellsworth's "child" and "project." 3 A. BEVERIDGE, *THE LIFE OF JOHN MARSHALL* 53-54 (1919).



of Detail. It seems unlikely these Senators would have designed a judiciary they knew to be fundamentally different from that contemplated at the Convention.

On the other hand, there is abundant evidence that the words used in article III simply did not connote for the founders the pyramidal model those same words are mistaken to mandate today

### III. THE NINTH RANDOLPH RESOLUTION

The basic proposals submitted to the Constitutional Convention were prepared by James Madison and other Virginia delegates before those from other states arrived,<sup>30</sup> and were introduced by Governor Randolph on May 29.<sup>31</sup> The ninth of these "Randolph Resolutions" proposed a permanent national judiciary with substantial subject matter jurisdiction.<sup>32</sup> While this proposal has often been contrasted with the Articles of Confederation, which authorized no permanent judiciary at all, the most remarkable feature of the Virginians' judiciary proposal seems to have been generally overlooked.

The ninth Randolph Resolution called for "one or more supreme tribunals."<sup>33</sup> Apart from and in addition to these *several* "supreme" courts, it also called for "inferior" tribunals.

The Constitutional Convention in Committee of the Whole first considered the ninth Randolph Resolution on June 4. The first clause of the Resolution, "that a National Judiciary be established," was moved and approved

30. See 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 22-23, 409 (M. Farrand rev. ed. 1966) [hereinafter RECORDS] (letter of George Mason to George Mason, Jr. (May 20, 1787) and letter of James Madison to Noah Webster (Oct. 12, 1804), respectively). For other statements to the same effect, see *id.* at 525, 532, 536 and 549.

31. 1 RECORDS, *supra* note 30, at 15-28.

32. The Resolution states:

[Resolution 9] [resd. that a National Judiciary be established to consist of one or more supreme tribunals, and of inferior tribunals to be chosen by the National Legislature, to hold their offices during good behaviour; and to receive punctually at stated times fixed compensation for their services, in which no increase or diminution shall be made so as to affect the persons actually in office at the time of such increase or diminution. that [sic] the jurisdiction of the inferior tribunals shall be to hear & determine in the first instance, and of the supreme tribunal to hear and determine in the dernier resort, all piracies & felonies on the high seas, captures from an enemy; cases in which foreigners or citizens of other States applying to such jurisdictions may be interested, or which respect the collection of the National revenue; impeachments of any National officers, and questions which may involve the national peace and harmony.

*Id.* at 21-22.

33. *Id.* at 21 (emphasis added). The significance of the explicit plural here is not diminished by the use of a singular in the succeeding sentence—for reasons later made clear by Madison, as will appear below. See *infra* notes 36-38 and accompanying text.

without opposition.<sup>34</sup> Then the delegates agreed to substitute language providing that the judiciary "consist of One supreme tribunal, and of one or more inferior tribunals."<sup>35</sup>

Superficially this action—taken without reported debate and at the very end of a long day spent deciding for a unitary Executive<sup>36</sup> and for an overridable veto in lieu of a council of revision—might seem to indicate a Convention decision to construct the national judiciary on a pyramdic model. However, the full record of Convention deliberations concerning the judiciary repels this interpretation.

It seems instead that this wording change (the movant of which is not reported) is better viewed as the first of several parliamentary steps by the delegates who maintained that all litigation should begin (and ordinarily end) in *state* courts, with only a single national tribunal to review certain classes of cases. After eliminating the language countenancing more than one "supreme" court, these delegates next took aim at the substituted phrase regarding "inferior" federal courts. At the start of business the next day the words "one or more" were stricken from this "inferior" courts provision;<sup>37</sup> and a short time later Rutledge of South Carolina—avowing the goal of a solitary national tribunal—moved to eliminate the provision for "inferior" courts entirely.<sup>38</sup>

What followed on June 5 was a series of parliamentary actions that ended at last with a compromise which not only left the existence *vel non* of other federal courts to the legislature's discretion, but also specifically and explicitly negates any inference that the federal judiciary, if comprised of more than one court, must be hierarchical or pyramdic in form.

Exactly how, and on what premises, that compromise was reached, is elaborated later in this Article. First, however, it is useful to explain why Virginia's original proposal for a multiplicity of "supreme" courts, a proposal which today seems so odd as perhaps to have been a draftsman's mistake, was quite unremarkable in its time. No prior commentator appears to have reckoned that the Virginians could have meant exactly what they said. However, until this feature of the Virginia proposal is understood, one cannot accurately apprehend the significance of the Convention's subsequent actions regarding the judicial branch.

---

34. *Id.* at 104 (record of Madison); *see also id.* at 95 (record of Journal).

35. *Id.* at 95, 104-05 (records of Journal and Madison respectively).

36. The choice between a unitary and a plural executive seems quite unrelated to the decision for no more than one "supreme" court. Plurality in the executive was urged by some to prevent one man's autocracy; any analogy, it would seem, must be to how many judges a court should have, rather than to how many courts there should be.

37. *Id.* at 116, 119 (records of Journal and Madison respectively).

38. *Id.* at 118, 124 (records of Journal and Madison respectively); *see also id.* at 119 (record of Madison).

## IV. "SUPREME" COURTS IN THE FRAMERS' WORLD

A. *England's Judiciary*

Americans' best source of information about English law and practice was Blackstone's *Commentaries*.<sup>39</sup> It is significant, therefore, that Blackstone called courts "inferior" and "supreme" without reference to hierarchy.

Some of England's "prodigious variety of courts,"<sup>40</sup> were archaic local courts not of record. The jurisdiction of these tribunals—which included the courts-baron, piepoudre, hundred and county courts—was subject to narrow geographic and subject matter restraints.<sup>41</sup> Blackstone called these tribunals "inferior," not because they were low in the hierarchy of a pyramidal judicial system,<sup>42</sup> but because of the restraints on their competence and because they were not part of the royal justice system at all.<sup>43</sup> As the royal judiciary and its "common law" increased in dominance, it became routine for matters brought in such tribunals to be removed to royal courts by King's writ before trial, or reheard pursuant to writ of false judgment or (in the case of the piepoudre) writ of error.<sup>44</sup>

Blackstone characterized as "inferior" in quite a different sense the courts of assize and nisi prius. These "courts" were convocations where travelling royal Justices sat with local jurors to ascertain facts for matters pending before King's Bench or Common Pleas at Westminster.<sup>45</sup> Blackstone called the courts of assize and nisi prius "inferior" because they "are derived out of, and act as collateral auxiliaries to" King's Bench and Common Pleas.<sup>46</sup>

However, Blackstone also used the adjective "inferior," as well as "superior" and "supreme," with reference to the several royal courts themselves (the Court of Common Pleas, the Court of King's Bench, the divisions of the Court of Exchequer and the High Court of Chancery), even though there was no pyramidal hierarchy among them.

The geographic cognizance of each of these courts was the entire kingdom and, by the time Blackstone wrote, their subject matter domains significantly

---

39. Professor Friedman states:

When Blackstone's *Commentaries* were published (1765-69), Americans were his most avid customers. At last there was an up-to-date shortcut to the basic themes of English law. An American edition was printed in 1771-72, on a subscription basis, for sixteen dollars a set; 840 American subscribers ordered 1,557 sets—an astounding response.

L. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 102 (2d ed. 1985).

40. 3 W. BLACKSTONE, *COMMENTARIES* 24 (12th ed. 1794).

41. *Id.* at 24-25, 32-37.

42. Blackstone observed that a pyramidal system had prevailed centuries earlier; but it was long gone by his time. *Id.* at 30-31.

43. *Id.* at 32-37.

44. *Id.*

45. *Id.* at 57-60.

46. *Id.* at 58.

overlapped.<sup>47</sup> Certain proceedings commenced in one of these tribunals could be reviewed in various of the others; but there was no consistent scheme.

King's Bench, for example, could review Common Pleas' determinations by writ of error.<sup>48</sup> Blackstone denominated the latter "inferior" to the former;<sup>49</sup> but he also called the Court of Exchequer "inferior" to *both*, even though *no* Exchequer determinations were reviewable by Common Pleas and *not all* of them were reviewable by King's Bench.<sup>50</sup>

Distinct from the Court of Exchequer was the Court of Exchequer Chamber. This exclusively appellate tribunal had no judges uniquely its own, and was composed differently for different purposes. Comprised of the Common Pleas justices plus the Exchequer barons, it could determine upon writs of error from proceedings originated in the Court of King's Bench. Comprised of Exchequer barons, Common Pleas justices, King's Bench justices, and sometimes the Chancellor as well, it could determine causes thought particularly difficult or weighty, adjourned to it before judgment from *any* of those other courts. Comprised of the Lord Chancellor and Lord Treasurer together with all the justices of King's Bench and Common Pleas, it could determine upon writs of error from the common law side of the Court of Exchequer.<sup>51</sup>

Determinations made on the equity side of the Court of Exchequer, however, were not reviewable by the Court of Exchequer Chamber at all; instead, they were appealable immediately to the House of Lords,<sup>52</sup> as were determinations of the Court of Exchequer Chamber itself.<sup>53</sup> Similarly, determinations of the High Court of Chancery,<sup>54</sup> as well as those King's Bench determinations ineligible for Exchequer Chamber review,<sup>55</sup> were appealable immediately to the House of Lords.

Blackstone called *all* these tribunals of kingdom-wide competence "superior" to distinguish them from the local, limited tribunals and from the "collateral auxiliaries,"<sup>56</sup> even though he described some of them as "inferior," too.<sup>57</sup> He also called the Court of King's Bench "the supreme court

---

47. Consequently, numerous matters might be pursued (with only a change of form) alternatively in Common Pleas, or at King's Bench, or on the common law side of the Court of Exchequer. *Id.* at 37-57.

48. *Id.* at 44.

49. *Id.* at 42.

50. *Id.* at 44-46.

51. *Id.* at 56-57.

52. *Id.* at 46.

53. *Id.* at 57.

54. *Id.* at 56.

55. *Id.* at 44, 57, 410-11.

56. *Id.* at 25, 37.

57. See *supra* text accompanying notes 49-50.

of common law in the kingdom"<sup>58</sup>—even though decisions made by the King's Bench in original cases were reviewable by the Court of Exchequer Chamber (*i.e.*, Common Pleas justices and Exchequer barons sitting together), and all King's Bench determinations were reviewable by the House of Lords.

Blackstone also called the House of Lords "the supreme court of judicature in the kingdom."<sup>59</sup> Insofar as the Lords could overrule even King's Bench, one might argue that this *particular* use of that adjective connoted a hierarchy. However, the judicial role of the House of Lords always was exceptional, and would not be emulated in most of republican America where predominant opinion demanded a sharper separation of legislative from judicial powers.<sup>60</sup> Thus, with the arguable exception of his reference to the House of Lords, it is manifest that Blackstone did not imply a pyramidal or hierarchical model when he used the adjectives "inferior," "superior" and "supreme" with reference to England's courts.

### B. Virginia's Judiciary

Virginia's delegation to the Constitutional Convention included not only James Madison, but also the state's governor, Edmund Randolph, and two of its principal jurists, George Wythe and John Blair. Wythe was respected as a professor of law at William and Mary, and had been a chancellor of the state for about ten years.<sup>61</sup> John Blair joined the Virginia General Court in 1777, and became its Chief Justice in 1779, serving at the same time as a member of the Virginia Court of Appeals (as Chancellor Wythe also had). In 1780, Blair became one of the chancellors of Virginia's High Court of Chancery.<sup>62</sup> These men were intimately familiar with Virginia's judicial structure which, from independence until well after 1787, no more resembled a pyramid than did England's judicial system.<sup>63</sup>

Virginia's county courts and the corporation courts in the state's larger towns had survived from colonial times substantially unchanged. Those

---

58. 3 W. BLACKSTONE, *supra* note 40, at 41.

59. *Id.* at 56.

60. See Comment, *The Council of Revision and the Limits of Judicial Power*, 56 U. CHI. L. REV. 235 (1989) (an especially commendable Comment by student Editor-in-Chief James Barry).

61. See L. BAKER, JOHN MARSHALL, A LIFE IN LAW 63-64, 386-87 (1974); D. MALONE, JEFFERSON THE VIRGINIAN 64-74 (1948) (volume 1 of *Jefferson and His Time*).

62. J. GOEBEL, ANTECEDENTS AND BEGINNINGS TO 1801, at 552-53 (1971) (volume 1 of *The Oliver Wendell Holmes Devise: History of the Supreme Court of the United States*).

63. The following account of Virginia's judicial system is based upon Tucker, *Appendix to 4 W. BLACKSTONE, COMMENTARIES, WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA* 1-74 (St. George Tucker ed. 1803) [hereinafter Tucker, *Appendix*].

tribunals, quite limited in geographical and subject matter jurisdiction, commonly were called "inferior."

In colonial times, appeals had run in all cases from those courts to the "general court" composed of the governor and council. (From there, apparently, appeals could go to the general assembly.) In 1777, however, the "general court" was reconstituted; its chancery jurisdiction was vested in a separate High Court of Chancery; and a Court of Admiralty was created. The reconstituted General Court and the new High Court of Chancery continued appellate review of the old county courts in matters of common law and equity respectively; but in addition, they were also made the principal courts of *first* instance, having state-wide competence.

Among the General Court, the Court of Admiralty and the High Court of Chancery there were differences of function but not of dignity. Each was denominated "supreme" in its own realm, the General Court, for example, being called "the supreme court of common law jurisdiction." Yet the High Court of Chancery could require opinions of the "supreme" General Court on questions of law, and could direct that issues be tried there; and, in some circumstances, the High Court of Chancery could even take cognizance of suits at law properly cognizable in the General Court. Moreover, the five judges of the "supreme" General Court sat in panels of three; and there being no reconciling body, inconsistencies among panel judgments were not uncommon.

Virginia's 1776 Constitution and 1777 legislation established a Court of Appeals with appellate authority over the General Court, Court of Admiralty and High Court of Chancery alike. This Court of Appeals had no separately commissioned judges: it consisted of all the judges of the three courts it was constituted to review. This Court of Appeals was called "the supreme judicial court of the commonwealth," even though each of the courts whose judgments it reviewed was also called "supreme."

Because Virginia's judicial system was undergoing controversial reorganization at the time,<sup>64</sup> such men as Governor Randolph, Judge Wythe, Chancellor Blair and James Madison could not have been unaware that Virginia in 1787 had *four* "supreme" courts, with a complex of relations among them. Based on their own experience, therefore, the Virginians must

---

64. Virginia's legislature in 1784 had required the judges of the General Court, Admiralty and Chancery all to attend assizes as subordinate auxiliaries of the General Court. That plan was repealed before being put fully into effect; but in 1787 the legislature approved a new plan under which the judges of all three of those "supreme" courts were also to sit, without separate commission, as judges of newly created "district courts" having jurisdiction coterminous with that of the General Court itself. The General Court held this plan unconstitutional and declined to carry it out, whereupon the legislature in special session suspended and then repealed it. In 1792 the legislature enacted a new plan of district courts manned only by General Court judges and operating as "so many branches of the same stock." *Id.* at 11-12.

have considered quite reasonable their proposal for "one *or more* supreme tribunals" in the national judicial system.

### C. *Other States' Judiciaries*

Nor could the delegates from other states have been surprised at the suggestion of more than one "supreme" court, for in several of those states, too, the adjective was used with reference to more than one court and in *none* was it reserved for the apex of a judicial pyramid.

#### 1. Delaware

Delaware had "common pleas and orphans' courts" in each county, a single judge of admiralty, and a three-judge "supreme court of Delaware." That "supreme" court, however, had no appellate role; moreover, its own determinations were subject to appellate review. Delaware's Constitution provided for an appeal "from the supreme court of Delaware, in matters of law and equity, to a court of seven persons" called the "court of appeals," which had "all the authority and powers heretofore given by law in the last resort to the King in council, under the old government."<sup>65</sup>

#### 2. New Jersey

The Governor doubled as Chancellor in New Jersey, and there was one statewide tribunal called "the Supreme Court" in addition to "the Inferior Court of Common Pleas in the several Counties." Again, however, the word "supreme" did not connote a judicial pyramid: New Jersey's Constitution provided that "the Governor and Council"<sup>66</sup> [shall] be the Court of Appeals, in the last resort, in all causes of law, as heretofore . . ."<sup>67</sup>

#### 3. Pennsylvania

In Pennsylvania there were courts of common pleas, courts of sessions, and orphans' courts in each county, while statewide there were the "judge[s]

---

65. DEL. CONST. of 1776, arts. 12, 17, *reprinted in 2 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS* 201-02 (W. Swindler ed. 1973) [hereinafter *SOURCES*]. The "courts of common pleas and orphans' courts" in each county were empowered to hold "inferior courts of chancery." DEL. CONST. of 1776, art. 13, *reprinted in 2 SOURCES, supra*, at 201.

66. That is, the Legislative Council, which consisted of one member from each county (footnote added).

67. N.J. CONST. of 1776, arts. III, VIII, IX, XII, *reprinted in 6 SOURCES, supra* note 65, at 450-51.

of the admiralty" and "the supreme court of judicature."<sup>68</sup> In addition to statewide general competence in the first instance, this "supreme" court had some appellate functions,<sup>69</sup> but not as the apex of a judicial pyramid. Pennsylvania's legislature had created<sup>70</sup> "the high court of errors and appeals" "to decide on writs of error from the supreme court, and on appeals from" the courts in the several counties.<sup>71</sup>

#### 4. Maryland

Maryland did have a pyramidal system, but *none* of its courts was denominated "supreme." There was a "Court of Chancery," a "General Court," and a "Court of Admiralty." Maryland also had a "Court of Appeals" "whose judgment shall be final and conclusive, in all cases of appeal" from the other three.<sup>72</sup>

#### 5. North Carolina

In North Carolina there were three separate statewide tribunals, apparently of equal dignity, with no hierarchical arrangements among them. The North Carolina Constitution called *two* of the three "supreme."<sup>73</sup>

#### 6. New York

New York's Constitution labelled only one court "supreme," but treated it as of no greater dignity than the state's chancellor and the courts of probate and of admiralty, and prescribed no hierarchy among them.<sup>74</sup>

---

68. PA. CONST. of 1776, §§ 20, 23, 26, *reprinted in* 8 SOURCES, *supra* note 65, at 282-83. There was no separate chancery court there, but "the supreme court of judicature" as well as the several "courts of common pleas" were given certain equity powers. PA. CONST. of 1776, § 24, *reprinted in* 8 SOURCES, *supra* note 65, at 283.

69. *See* 2 THE WORKS OF JAMES WILSON, *supra* note 25, at 459-60.

70. The legislature was empowered to establish any other courts it deemed useful. PA. CONST. of 1776, § 26, *reprinted in* 8 SOURCES, *supra* note 65, at 283.

71. 2 THE WORKS OF JAMES WILSON, *supra* note 25, at 458. Wilson's account deals specifically with this court as it was reconstituted after adoption of the 1790 Pennsylvania Constitution. However, he observed that "a court of the same name and of much the same kind was known" under the 1776 Constitution. *Id.* at 460.

72. MD. CONST. of 1776, art. LVI, *reprinted in* 4 SOURCES, *supra* note 65, at 383.

73. The three tribunals were the "Supreme Court of Law," the "Supreme Court of Equity" and the "Judges of Admiralty." N.C. CONST. of 1776, arts. XIII, XXI, XXIX, *reprinted in* 7 SOURCES, *supra* note 65, at 405-06.

74. N.Y. CONST. of 1777, arts. III, XXIV, XXV, XXVII, *reprinted in* 7 SOURCES, *supra* note 65, at 172, 176.



## 7. Massachusetts and New Hampshire

In equivalent constitutional provisions, only passing reference was made in Massachusetts to "the supreme judicial court"<sup>75</sup> and in New Hampshire to "the superior court."<sup>76</sup> In both states, general constitutional language authorized the legislature to constitute such courts as might seem needed.<sup>77</sup> If pyramided systems were standard, one might expect the "supreme" or "superior" court in these states to be given general review functions; but neither was.<sup>78</sup>

## 8. Georgia

In Georgia's Constitution, the terms "supreme court" and "superior court" were used interchangeably.<sup>79</sup> There were several supreme courts in Georgia, one for each county. All of these courts were trial tribunals, from which no appeals were possible at all except by demand for a new trial in the *same* court by a specially selected second jury.<sup>80</sup>

In the other original states, neither appellate lines nor court names were constitutionally prescribed; the judiciary was left to be statutorily designed.

In sum, based on their own experience and the common word usage of the time it seems most unlikely that the Convention delegates from the several states could have considered either odd or remarkable the Virginians' proposal of *several* "supreme" courts, in addition to courts not called "supreme."

## V. THE JUNE 5 COMPROMISE

The principal opposition to Rutledge's June 5 motion to eliminate the substituted language authorizing "inferior" federal courts came from James Madison of Virginia, who had co-authored the original ninth Randolph Resolution. Madison had not objected the previous day to the substitute

---

75. MASS. CONST. of 1780, pt. 2, ch. III, art. II, *reprinted in* 5 SOURCES, *supra* note 65, at 104-05.

76. N.H. CONST., pt. 2, *reprinted in* 6 SOURCES, *supra* note 65, at 354.

77. MASS. CONST. of 1780, pt. 2, ch. I, § 1, art. III, *reprinted in* 5 SOURCES, *supra* note 65, at 96-97; N.H. CONST., pt. 2, *reprinted in* 6 SOURCES, *supra* note 65, at 348.

78. In fact, for probate matters yet another forum for review was ordained. MASS. CONST. of 1780, pt. 2, ch. III, art. V, *reprinted in* 5 SOURCES, *supra* note 65, at 105; N.H. CONST., pt. 2, *reprinted in* 6 SOURCES, *supra* note 65, at 354.

79. Compare GA. CONST. of 1777, art. XL with arts. XXXVI-XXXIX, *reprinted in* 2 SOURCES, *supra* note 65, at 447-48.

80. GA. CONST. of 1777, art. XL, *reprinted in* 2 SOURCES, *supra* note 65, at 448. Regular and special juries alike were judges of law as well as of fact, although they could ask the bench (comprised of four or more judges) for seriatim opinions on the law. GA. CONST. of 1777, art. XLI, *reprinted in* 2 SOURCES, *supra* note 65, at 448.

language under which the label "supreme" had been reserved for only *one* court, but apparently that was because he did not see the move (as others conceived it) as a first step toward foreclosing any multiplicity of federal courts at all.

Madison thought there should be more than one federal court, but he did not advocate a pyramidal system with one ultimate terminus for appeals. On the contrary, he argued that "unless inferior [federal] tribunals were dispersed throughout the Republic with *final* jurisdiction in *many* cases, appeals would be multiplied to a most oppressive degree."<sup>81</sup> He cited the risk of "improper Verdicts in State tribunals obtained under the biased directions of a dependent Judge, or the local prejudices of an undirected jury," and the impractical remedy of "a new trial at the supreme bar" remote from litigants' and witnesses' homes, as reasons for establishing a *dispersed set* of federal tribunals.<sup>82</sup> However, Madison did *not* think such factors showed any need for review by one central national court. Instead, he argued for dispersed federal courts *of last resort*.

For Madison there was no anomaly in conceiving of "*final* jurisdiction" for "inferior" federal courts. One connotation plainly carried by the adjective "supreme" both in England and in Virginia at that time was nationwide (or statewide) geographical competence, and Madison was contemplating *regional* federal courts. Madison did not elaborate on this occasion whether the regional national courts he conceived should review certain state court judgments in addition to entertaining original proceedings. However, Madison did make explicit, highlighted by the emphasis he supplied in his own notes, his view that from such regional courts, "in *many* cases," no further recourse should lie.

Madison was joined by James Wilson in opposing the Rutledge motion. Although Wilson presumably already subscribed to his pyramidal ideal for judicial systems, his argument on this occasion made no mention of it.<sup>83</sup> The combined arguments of Madison and Wilson, however, failed to defeat the Rutledge motion. Sherman of Connecticut, who seconded, "dwelt chiefly on the supposed expensiveness of having a new set of Courts, when the existing State Courts would answer the same purpose."<sup>84</sup> This consideration seems to have proven persuasive.<sup>85</sup>

---

81. 1 RECORDS, *supra* note 30, at 124 (emphasis in original) (record of Madison).

82. *Id.*

83. *Id.* Wilson urged that admiralty jurisdiction should be given over entirely to the national government. *Id.* If that were done, the workload certainly would be greater than a single national court could carry. There is no record of how, if at all, Wilson responded to Madison's suggestion of "finality" for judgments by "inferior" national courts.

84. 1 RECORDS, *supra* note 30, at 125 (record of Madison).

85. Maryland's Luther Martin later decried the provision allowing more than one federal court not only because of the "enormous additional and unnecessary expense," but also out of exaggerated fears that the state judiciaries would be "swallow[ed] up." Martin, *Genuine*

The vote, nonetheless, showed a lack of resolve: The Rutledge motion to allow only one federal court was approved only five states to four, with two states divided.<sup>86</sup> Taking the close vote to invite compromise, Madison and Wilson<sup>87</sup> then moved "that the National Legislature be empowered to institute inferior tribunals."<sup>88</sup>

In support of this compromise, "[t]hey observed that there was a distinction between establishing such tribunals absolutely, and giving a discretion to the Legislature to establish . . . them. They repeated the necessity of some such provision."<sup>89</sup> Precisely which of their arguments on "the necessity of some such provision" were literally repeated, the records do not disclose. There is evidence, however, that Madison's thesis—that *more than one* federal tribunal of last resort might be needed—now gained additional support: Rufus King of Massachusetts observed that the expense of maintaining additional federal tribunals would be "infinitely less" than the cost of the appeals which their existence could prevent.<sup>90</sup> King's comment makes sense only upon Madison's premise; otherwise, there could just as frequently be appeals from the inferior federal courts, in which case such cost savings could not accrue.<sup>91</sup>

---

*Information*, Md. Gazette & Baltimore Advertiser, Dec. 28, 1787 to Feb. 8, 1788, reprinted in 3 SOURCES, *supra* note 30, app. A, CLVIII, at 206-07 (emphasis in original) (speech to the Maryland Legislature in 1787).

86. 1 SOURCES, *supra* note 30, at 118, 125 (records of Journal and Madison respectively).

87. Yates attributed this motion to Wilson. *Id.* at 127. Madison attributed it to "Mr. Wilson & Mr. Madison." *Id.* at 125. In any event, the idea had been suggested earlier during debate on the Rutledge motion, by Dickinson of Delaware. *Id.* at 125 (record of Madison).

88. *Id.* at 125 (record of Madison); see also *id.* at 118, 127 (records of Journal and Yates respectively).

The phrase "to institute" appears in Madison's account. Both the Journal and Yates' notes, however, use the phrase "to appoint." Criticizing reliance upon Madison's account, Professor Julius Goebel speculates that delegates wanting just one national tribunal nonetheless supported the Madison-Wilson proposal because they believed State courts would be "appointed" for national purposes, as sometimes had been done under the Articles of Confederation. See J. GOEBEL, *supra* note 62, at 211-12 n.76.

Goebel's speculation is unwarrantably strained. It seems more reasonable to trust Madison's account of what he describes as his own (and Wilson's) motion. Furthermore, Dickinson (whose earlier comment inspired that motion) apparently had used the same phrase, "to institute." See 1 RECORDS, *supra* note 30, at 125 (record of Madison). Moreover, Madison reports that discussion of the motion took place in terms of "establishing" such courts, not of "appointing" them. *Id.* Both the Journal and Madison records show "appoint" being used when the same proposition was unanimously reaffirmed on July 18; and "appoint" was the word in the resolution as referred to the Committee of Detail. 2 *id.* at 39, 46, 133 (records of Journal, Madison and Committee of Detail respectively). Finally, not a whisper of protest was heard when the Committee of Detail substituted the word "constitute." See *id.* at 313, 315 (records of Journal and Madison respectively).

89. 1 RECORDS, *supra* note 30, at 125 (record of Madison).

90. *Id.*

91. The Convention's previous actions presumed that state courts should decide cases in realms of federal court competence, but not that they should decide them with no chance for federal review. Therefore King's cost comparison was between *final* proceedings in dispersed federal courts (whether original there, or on review from state courts) and the costlier alternative of reviewing those federal proceedings in the distant, single "supreme" court.

Immediately after King's comment, the vote on the motion was taken, and the Madison-Wilson compromise proposal was decisively approved.<sup>92</sup> This June 5 compromise regarding the existence vel non of "inferior" national courts was adhered to throughout the remainder of the Convention, and of course is reflected in the Constitution as ultimately approved.<sup>93</sup>

Although much has been written about this compromise, no commentator seems to have noticed the significance of the premise on which the compromise was based:<sup>94</sup> Madison, King, and those they persuaded believed "inferior" tribunals would be useful precisely because they could exercise "final jurisdiction in many cases," sparing litigants the vexation and expense of a geographically distant forum of ultimate recourse and at the same time preventing the one court denominated "supreme" from being overburdened with the anticipated load of cases warranting federal judicial attention.<sup>95</sup>

So plain was the premise of the June 5 compromise that Madison later was puzzled when George Mason objected that article III portended ultimate

92. The Journal records the vote as 7-3, with one state divided, Madison reports it as 8-2, with New York divided, and Yates concurs with the Journal. 1 RECORDS, *supra* note 30, at 118, 125, 127 (records of Journal, Madison and Yates respectively).

93. The power to constitute "inferior" tribunals is conferred upon Congress by U.S. CONST. art. I, § 8, cl. 9, and also is alluded to in art. IV, § 1. See *infra* text accompanying notes 157-68.

94. My estimable friend Akhil Amar did highlight this statement by Madison. Amar, *Marbury*, Section 13, and the Original Jurisdiction of the Supreme Court, 56 U. CHI. L. REV. 443, 473 (1989). However, Amar took it to explain why "exceptions" might be made to the appellate jurisdiction that he conceived the Supreme Court should have "in the great run of cases." *Id.* at 472. My point, by contrast, is that Madison and the others (and, in turn, the first Congress) conceived that "the great run of cases" should end with no prospect of attention from the "supreme" tribunal at all.

As to the "exceptions clause" (which neither in rhetorical form nor in substance is a grant of power), see *infra* text accompanying notes 154-64.

95. The Committee of Detail made a minor wording change that could be thought to place a pyramidal innuendo on the Constitution's face. The June 5 motion and every subsequent recital of its substance (including the text of resolutions referred to the Committee) had referred to the optional tribunals simply as "inferior"; but the Committee Report language was "inferior to the Supreme Court." Compare 2 RECORDS, *supra* note 30, at 133 with *id.* at 182.

This innovation originated in notes made early in Committee of Detail deliberations by Randolph. *Id.* at 144. Wilson incorporated the innovation into his own draft, upon which the Committee's Report was chiefly based. *Id.* at 168. The modified language was approved by the Convention on August 17 without dissent or recorded debate. *Id.* at 313, 315 (records of Journal and Madison respectively). Inferior "to" is the wording that appears in the finished Constitution. U.S. CONST. art. I, § 8, cl. 9.

One ought not attach significance to this minor change in wording. As illustrated by Blackstone and the American states' practice, it then was common to describe one tribunal as inferior "to" another for a variety of reasons (e.g., lesser subject matter or geographic competence) despite lack of such appellate or supervisory lines as would make out a pyramidal scheme. Furthermore, the same Committee of Detail innovated other language specifically affirming that Congress could make "inferior" court judgments not reviewable by the "supreme" court at all.

The utter lack of controversy over the Committee's innovation in wording seems more consistent with its being considered as mere verbal refinement than as a departure from the premise of all of the other Convention actions on this point.

recourse to a distant central forum so that justice would be tedious, ruinously expensive, and unattainable by men of ordinary means.<sup>96</sup> A month after the Convention's adjournment Madison wrote to George Washington: "What he means by a dangerous tendency of the Judiciary I am at some loss to comprehend. It was never intended, nor can it be supposed that in ordinary cases the inferior tribunals will not have final jurisdiction in order to prevent the evils of which he complains."<sup>97</sup>

Surely there were some at the Convention who idealized the pyramidal model,<sup>98</sup> just as there were several who believed there should be only one federal court.<sup>99</sup> But the decision of June 5 was, after all, a compromise. The crucial point is that it was a compromise not only as to whether more than one national court should exist, but also as to whether (and to what extent) there should be appellate recourse from any others (if created) to the one court denominated "supreme." The import of the compromise was to leave *both* of these questions to legislative discretion: Congress would be trusted, should it create other courts, to weigh against the benefits of speedier and less costly dispute resolution the possible inconvenience of inconsistent, yet unreviewable, "*final*" judgments "*in many cases*" by collateral, rather than hierarchical, federal tribunals.

## VI. RAMIFICATIONS OF THE JUNE 5 COMPROMISE

The next several pages trace the formulation of the Constitution's judiciary provisions more exactly in certain respects than it ever has been traced heretofore.

The compromise of June 5 had significant ramifications for other issues to be determined regarding the judiciary. The remainder of the ninth Randolph Resolution had been drafted on the assumption that several federal courts would exist; consequently, once its second phrase had been altered

---

96. PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 327, 329-30 (P. Ford ed. 1888) [hereinafter PAMPHLETS], reprinted in 1 B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 444, 445 (1971).

97. Letter of James Madison to George Washington (Oct. 18, 1787), reprinted in 5 THE WRITINGS OF JAMES MADISON 11, 12 (Hunt ed. 1904).

98. Among them, James Wilson, who co-sponsored the compromise motion on June 5.

99. To those concerned about inconsistent state court decisions in the relevant subject matter areas Rutledge pointed out that a solitary national tribunal would be "sufficient to secure uniformity of Judgments [sic]." 1 RECORDS, *supra* note 30, at 124 (record of Madison). Some might have anticipated equally troublesome inconsistencies should there be several federal courts without some body to reconcile them; but no one articulated this concern.

Reasons for this are not difficult to conceive: Apprehension of such difficulties might have been slight because there was less separation then between the functions of judge and jury. Little thought was yet being given to the questions later to emerge as the controversy over a national or "federal common law." Moreover, judicial law-making deforms the Blackstonian tradition then was scarcely known (or perceived).

to leave this question to legislative discretion, certain other clauses no longer were apt.

For example, the Resolution allocated distinct roles to the "supreme" and "inferior" courts within the realm of subject matter competence<sup>100</sup> it proposed: The "inferior" were to consider such cases "in the first instance," and the "supreme" to consider them only "in the dernier resort."<sup>101</sup> If state courts should lack competence in any such matter, to leave "inferior" tribunals optional would mean there might be no court of first instance for such cases at all—and thus no such case for the "supreme" court to hear "in the dernier resort." There were some matters that seemed clearly inappropriate for state court adjudication.<sup>102</sup> Should such matters indeed be excluded from *any* judicial cognizance? Would including them make at least *some* "inferior" tribunals obligatory instead of discretionary? Or should they be dealt with by making the jurisdiction of the one "supreme" court more than strictly "dernier"?

Furthermore, the compromise contemplated "*final*" determinations by the "inferior" tribunals (should Congress create them), at least "in *many* cases," so as to lighten the case load that otherwise would oppress the "supreme" court. If any of these "inferior" court determinations were to be "*final*," the "supreme" court could not be described as "*dernier*" for *every* case. What should be the boundary between those cases the "inferior" courts would resolve with finality and those cases eligible for further review?<sup>103</sup>

Many other organizational questions also remained. For example, there would be only one court labelled "supreme," but how many judges should it have? Should they sit in separate panels, or only en banc? Might (or must) any "inferior" courts serve as auxiliary organs on the model of *nisi prius* or *assize*, or could they (or must they) be separate entities in their own right? If the latter, must they have judges of their own, or could the judges appointed to the one "supreme" court be designated to serve on

---

100. The Resolution stated:

[A]ll piracies & felonies on the high seas, captures from an enemy; cases in which foreigners or citizens of other States applying to such jurisdictions may be interested, or which respect the collection of the National revenue; impeachments of any National officers, and questions which may involve the national peace and harmony.

1 RECORDS, *supra* note 30, at 22.

101. *Id.*

102. Impeachment of national officers is the clearest example, and captures from an enemy is another.

103. Professor Goebel remarked that the Convention's failure to proceed the same day to resolve the matter of the national courts' jurisdiction was inexplicable and "typical of the capricious *modus operandi* of the Committee [of the Whole]." J. GOEBEL, *supra* note 62, at 212 (emphasis in original). Even the few examples discussed here, however, demonstrate that Goebel's remark was unfair. The problems were complex enough that immediate improvisations could not have been satisfactory.

"inferior" courts as well? Appointment, compensation and tenure provisions to insulate the judiciary from untoward political influence were debated easily, repeatedly, and at length; but these other, more intricate details of organization involved complex and interrelated considerations, less susceptible to large group debate.

The week following June 5 allowed too little time for these questions to be given the reflection they were due. On June 12 a lame revision of the jurisdiction clause was proposed, deleting all reference to "inferior" courts and providing only "that the jurisdiction of the supreme Tribunal shall be to hear and determine in the dernier resort" the subject matters specified by the ninth Randolph Resolution.<sup>104</sup> A motion to postpone that proposal was made and approved,<sup>105</sup> and the delegates proceeded to approve three amendments to the subject matter scope proposed.<sup>106</sup> Gradually, however, the prematurity of tinkering with the "supreme" court's "dernier" competence before any of the more intricate problems entailed by the June 5 compromise had been resolved became more apparent, and that tinkering was curtailed. The pending motion as amended was simply abandoned, and a new motion to postpone consideration of the jurisdictional issues was approved. Thereupon the Convention adjourned for the day.<sup>107</sup>

Overnight there was time to reflect on just how much the task of describing subject matter competence was complicated by the unsettled organizational questions entailed by the June 5 compromise. The next morning, at the start of Committee of the Whole business, the delegates agreed "nem. con." to strike the jurisdiction part of the ninth Resolution in its entirety.<sup>108</sup> Madison's notes for June 13 explain that this was done "to leave full room for their organization,"<sup>109</sup> and Yates' notes suggest that the questions were thought appropriate for a sub-committee's attention.<sup>110</sup> Postponing the complications attributable to the June 5 compromise made it possible for the delegates to agree upon a tentative and truncated synopsis of jurisdiction for the judicial branch as a whole.<sup>111</sup> Thereupon the Committee

---

104. 1 RECORDS, *supra* note 30, at 211, 220 (records of Journal and Madison respectively).

105. *Id.* at 220 (record of Madison). The Journal does not indicate whether it was put to a vote. *Id.* at 211. The motion to postpone might have been made by someone who perceived that, for the reasons suggested in the preceding paragraph of the text, this language was plainly inadequate.

106. *Id.* at 211, 220 (records of Journal and Madison respectively). The amendments were to eliminate jurisdiction over "all piracies & felonies on the high seas" and over "captures from an enemy," and to modify the wording of the clause providing jurisdiction over cases involving citizens of different States. *Id.*

107. *Id.* at 212, 220 (records of Journal and Madison respectively).

108. *Id.* at 232, 238 (records of Madison and Yates respectively). The Journal does not record this action.

109. *Id.* at 232.

110. *Id.* at 238.

111. *See id.* at 223-24, 232, 238 (records of Journal, Madison and Yates respectively). This

of the Whole reported to the Convention<sup>112</sup> the surviving Randolph Resolutions<sup>113</sup> as amended, renumbered and somewhat rearranged.<sup>114</sup>

Over the next six weeks the Convention did nothing to resolve the problems of judicial organization and workload allocation they had deferred.<sup>115</sup> Along with many other matters, these were left to be considered by the Committee of Detail.<sup>116</sup>

---

June 13 decision that the Constitution itself should mandate the combined scope of subject matter jurisdiction for the federal judiciary as a whole, rather than leaving Congress to decide whether some categories should be omitted or others added, was reaffirmed several times on August 27. 2 *id.* at 423-25, 428, 431 (records of Journal, Madison and Madison respectively). The last action was definitive, emphatic and unanimous.

The point of this repeatedly affirmed determination was that, although Congress should be free to distribute and redistribute among various tribunals the full subject matter jurisdiction contemplated for the national judiciary, it should be *incompetent to divest* any part of it entirely from the judicial department once that part had been vested in some article III court.

Most judges and commentators since the *second* generation under the Constitution have reasoned that unqualified *discretion to divest* subject matter jurisdiction follows a fortiori, by "necessary implication," from Congress' power over the *existence* of "inferior" federal courts. These deliberate Convention actions on June 13 and August 27, however, seem flatly to foreclose precisely that inference.

112. 1 *id.* at 224, 234-37, 238-39 (records of Journal, Madison and Yates respectively).

113. At this point some delegates who were dissatisfied with the whole tenor of the proposals so far discussed joined with Paterson of New Jersey in requesting time to assemble an alternate plan. *Id.* at 240 (records of Journal, Madison and Yates). The Paterson Plan was presented on June 15, and referred to the Committee of the Whole; and to facilitate comparison the revised Randolph Resolutions (just reported to the Convention) were re-referred. *Id.* at 241, 242, 246 (records of Journal, Madison and Yates respectively). After four days the Committee of the Whole rose and re-reported the revised Randolph Resolutions without further amendment. *Id.* at 312, 322, 328 (records of Journal, Madison and Yates respectively).

While the Paterson Plan never displaced the Randolph Resolutions as the focus of Convention deliberations, certain features of the Paterson Plan did have major impacts, and thus help in ascertaining the Constitution's meaning. See *infra* notes 136 and 138 and their accompanying text (examples regarding the judiciary); see also *infra* note 119 (discussing the "detailing" of the judiciary's subject matter jurisdiction).

114. The judiciary was now dealt with in three resolutions, numbered 11, 12 and 13. 1 RECORDS, *supra* note 30, at 230-31, 236-37 (records of Journal and Madison respectively).

115. On July 18 they dealt with the appointment, tenure and compensation of judges, and debated again but unanimously reaffirmed their compromise decision to leave the existence of "inferior" tribunals to legislative discretion. 2 *id.* at 37-39, 41-46 (records of Journal and Madison respectively). They also eliminated the judiciary's role in impeachments, *id.* at 39, 46 (records of Journal and Madison respectively), and made some other changes in the subject matter reach of its jurisdiction, extending it beyond revenue laws to encompass all national laws while preserving the earlier approved jurisdiction over "such other questions as involve the National peace and harmony." *Id.* On July 21 they again discussed the appointment of judges, and also considered whether judges should participate in the veto function. *Id.* at 71-72, 78-83 (records of Journal and Madison respectively). On neither date, however, did they discuss the organization or work load problems.

116. The motion to refer to a committee "for the purpose of reporting a Constitution conformably to the Proceedings aforesaid," *id.* at 85 (record of Journal), and another motion fixing that committee's membership at five, were approved unanimously on July 23. *Id.* at 87, 95-96 (records of Journal and Madison respectively). The members were selected by ballot on July 24. *Id.* at 97, 106 (records of Journal and Madison respectively). Additional matters acted upon that week were referred on July 26. *Id.* at 117, 128 (records of Journal and



## VII. THE COMMITTEE OF DETAIL

One pervasive characteristic of the Committee of Detail's<sup>117</sup> work was its refinement of the postulate of "delegated" power into the principle of "enumerated powers."<sup>118</sup> This is evident with respect to the judiciary as much as to other matters.

This new technique of enumerating powers was more than a device for delineating the role of the national government within the realm of competence otherwise enjoyed by the states: The principle also applied to the separation of powers among the national government's branches: But for

---

Madison respectively). Madison's records indicate that the unapproved Pinckney and Paterson resolutions were also referred, *id.* at 128; but the Committee's charge was to report a Constitution conformable to the propositions that had been approved. The Convention then adjourned until August 6 to abide the Committee's work. *Id.* at 118, 128 (records of Journal and Madison respectively).

117. To one interested in the judiciary, the composition of this five-member Committee is noteworthy. *See generally id.* at 97, 106 (records of Journal and Madison respectively, documenting the composition of the Committee). John Rutledge of South Carolina was its Chair; it was he who had urged that state judiciaries handle *all* litigation, subject only to review in certain classes of cases by a single national court.

The other Committee members were Edmund Randolph of Virginia, Oliver Ellsworth of Connecticut, James Wilson of Pennsylvania, and Nathaniel Gorham of Massachusetts. Governor Randolph had introduced the Virginia Resolutions, which were the foundation of Convention debate. The compromise (co-sponsored by Wilson) between Randolph's ninth Resolution and Rutledge's position had given rise to the most difficult problems of judicial organization and work load allocation now left for the Committee to resolve.

Within little more than two years after their service on this Committee, Randolph would be the first United States Attorney General and Wilson would be an Associate Justice of the Supreme Court. Ellsworth would be a leading member of the Senate, where he would serve as chief architect of the Judiciary Act of 1789, Congress' first exercise of the power the Constitution would give it with regard to the judiciary.

118. On many points the Convention had agreed only upon general principles rather than precise terms. For example, the agreement regarding the national legislature was that it should be competent "to legislate in all Cases for the general Interests of the Union, and also in those Cases to which the States are separately incompetent, or in which the Harmony of the United States may be interrupted by the Exercise of individual Legislation." 2 RECORDS, *supra* note 30, at 131-32. The Committee understood one of its tasks to be to "detail" this general principle; consequently they originated the technique of "enumerating" powers, replacing this general language with a catalogue of particulars, most of them ultimately contained in U.S. CONST. art. I, § 8. *See* 2 RECORDS, *supra* note 30, at 181-82 (art. VII, § 1 of the Committee report).

As Committee member Wilson later explained to Pennsylvania's ratification convention:

[T]hough this principle [stated in the Convention's resolution] be sound and satisfactory, its application to particular cases would be accompanied with much difficulty; because, in its application, room must be allowed for great discretionary latitude of construction of the principle. In order to lessen or remove the difficulty arising from discretionary construction on this subject, an enumeration of particular instances, in which the application of the principle ought to take place, has been attempted with much industry and care.

2 THE WORKS OF JAMES WILSON, *supra* note 25, at 764 (speech delivered by James Wilson on November 26, 1787 to Pennsylvania's ratification convention).

this innovation it might have been assumed, given the parliamentary tradition, that unaddressed questions of government organization could be legislatively resolved. No such assumption, however, could be reconciled with the principle of "enumerated" powers. This new principle required that, if the legislature were to have any role in setting up judicial tribunals or prescribing their size, parameters or relative roles,<sup>119</sup> some language sufficient to authorize it to do so would have to be included in the enumeration of the legislature's powers, and not left to inference from the fact that no other body might be competent to do so.<sup>120</sup>

The Committee of Detail was faced with several significant problems relating to the judiciary. It was still unresolved in what cases, if any, the decisions of "inferior" courts, should Congress create some, might be, in Madison's word, "final." Whether and when "inferior" courts should be able to review *state* court decisions within the subject matter limits prescribed was likewise undecided. A suitable way to ensure a federal forum for cases deemed inappropriate for state adjudication, even if no more than one national court were created, still had to be found. Furthermore, the

---

119. The Committee used this same technique to "detail" the judiciary's subject matter jurisdiction. The relevant Convention resolution said the jurisdiction of the national judiciary "shall extend to Cases arising under the Laws passed by the general Legislature, and to such other Questions as involve the national Peace and Harmony." 2 RECORDS, *supra* note 30, at 132-33. The Committee replaced the latter phrase with an enumeration similar to what the Convention ultimately approved. *Id.* at 186-87 (art. XI, § 3 of the Committee report).

A diversity provision had been included in the original ninth Randolph Resolution, and an amendment to it approved on June 12; the Committee included a more elaborate diversity provision even though none had been included in the language approved June 13 or in the resolution as referred to the Committee.

The Committee included admiralty and maritime cases even though the resolutions as referred had not, and even though the piracy, high seas felony and capture provisions of the original ninth Randolph Resolution had been disapproved on June 12. This was evidently adapted from the Pinckney Plan, perhaps motivated by Wilson's strong interest in national jurisdiction over such cases. *See id.* at 136.

The Committee's inclusion of cases involving diplomatic representatives was apparently adapted from the Paterson Plan. *See 1 id.* at 244.

The provision for cases between states, and between states and sister states or foreign citizens, was original with the Committee. The Committee also included jurisdiction over impeachments of national officers, even though that had been disapproved by the Convention on July 18.

120. Likewise, any role for the legislature with regard to creating executive departments would have to be addressed in the enumeration of the legislature's powers rather than being left to inference from the fact that the President might be unable to create offices and establish departments by himself.

The Committee report, article VII, § 1, separately specified legislative power to establish post offices and to appoint a Treasurer. 2 *id.* at 182. Organizational authority was otherwise provided by the Committee's "necessary and proper" clause. *See infra* text accompanying notes 123-30. The special provision regarding a Treasurer was for the purpose of specifying that he must be appointed "by ballot." The Convention amended this to "joint ballot" on August 17. 2 RECORDS, *supra* note 30, at 312, 314-15, 320 (records of Journal, Madison and McHenry respectively). It was stricken out on September 14, to "let the Treasurer be appointed in the same manner with other officers." *Id.* at 611, 614 (records of Journal and Madison respectively).

Convention had only tentatively and partially sketched the subject matter competence of the federal judiciary as a whole, and had not determined to what extent federal judicial power should be exclusive of state judicial power. In considering all of these problems, the Committee was expected to respect the premise of the Convention's June 5 compromise: it must be possible for Congress (should it establish more than the one required federal court) to make the decisions of such "inferior" courts *final*.

The course of Committee deliberations is reflected in surviving documents. Edmund Randolph prepared an outline which survives as marked up by Committee Chair John Rutledge. Later in the proceedings James Wilson produced a document which survives as marked up, apparently by Wilson himself as well as Rutledge.<sup>121</sup> Many provisions in the Wilson document approximate the text submitted as the Committee's report.<sup>122</sup> Wilson's document and the Committee report were more faithful in several respects than Randolph's outline to the Convention's prior decisions regarding the judiciary, although all three reflected the new principle of enumerated powers.

Randolph included at the end of his list of national legislative powers a clause conferring power "to organize the government."<sup>123</sup> That particular clause was crossed out, apparently by Randolph himself,<sup>124</sup> but a comparable clause pertaining specifically to the judiciary was left intact. The latter provided, "and the legislature shall organize it."<sup>125</sup>

This language would have enabled the legislature to resolve any otherwise unresolved problems of judicial organization and work load allocation, but would have done so without any safeguarding restraints. Wilson replaced Randolph's grant of *carte blanche* discretion with language equally sufficient, but more restricted: At the end of his list of legislative powers Wilson included a clause granting power "to make all Laws that shall be necessary and proper for carrying into . . . Execution . . . all other powers vested, by this Constitution, in the Government of the United States, or in any Department or Officer thereof."<sup>126</sup>

At the second ellipsis there appeared the words, "the foregoing Powers, and"<sup>127</sup>—words which were retained in this "necessary and proper" clause as it was to appear in the Committee's report<sup>128</sup> and ultimately in the

---

121. The Randolph outline is printed in 2 RECORDS, *supra* note 30, at 137-52; the Wilson document is printed in *id.* at 163-75.

122. The report of the Committee of Detail is printed in *id.* at 177-89 (record of Madison).

123. *Id.* at 144.

124. *Id.* at 144, 147 n.6.

125. *Id.* at 147.

126. *Id.* at 168.

127. *Id.*

128. *Id.* at 182.

finished Constitution.<sup>129</sup> In the original of the surviving Wilson document, however, those four words are stricken, apparently by Wilson himself.<sup>130</sup> This suggests that, at its origin, the clause was conceived less as auxiliary to the other *legislative* powers than as authorization for the legislature to resolve all those matters of governmental organization which the Constitution itself might not address, including judicial organization and work load allocation.

Here, then, was an "enumerated power"<sup>131</sup> enabling Congress to determine the size and organization of the "one Supreme Court," and to resolve the problems of "inferior" court jurisdiction, finality and review that would arise if the power elsewhere granted<sup>132</sup> to

129. U.S. CONST. art. I, § 8, cl. 18.

130. 2 RECORDS, *supra* note 30, at 163 n.17, 168.

131. Now and then there has been passing judicial recognition that the "necessary and proper" clause is indeed the source of Congress' power in this regard. For example, in *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657 (1838), Justice Baldwin wrote for the Court:

It was necessarily left to the legislative power to organize the Supreme Court, to define its powers consistently with the constitution, as to its original jurisdiction; and to distribute the residue of the judicial power between this and the inferior courts, defining their respective powers, whether original or appellate, by which and how it should be exercised. In obedience to the injunction of the constitution, congress exercised their power so far as they thought it necessary and proper, under the seventeenth clause of the eighth section, first article, for carrying into execution the powers vested by the constitution in the judicial, as well as all other departments and officers of the government of the United States. No department could organize itself; the constitution provided for the organization of the legislative power, and the mode of its exercise, but it delineated only the great outlines of the judicial power: leaving the details to congress, in whom was vested, by express delegation, the power to pass all laws necessary and proper for carrying into execution all powers except their own. The distribution and appropriate exercise of the judicial power must therefore be made by laws passed by Congress.

*Id.* at 721 (citations omitted). Again, in *Ex parte Royall*, 117 U.S. 241 (1886), Justice Harlan wrote for the Court:

[A]s the judicial power of the nation extends to all cases arising under the Constitution, the laws and treaties of the United States; and as Congress has power to pass all laws necessary and proper to carry into execution the powers vested by the Constitution in the Government of the United States or in any department or officer thereof; no doubt can exist as to the power of Congress [to enact the 1867 Act conferring jurisdiction over federal question habeas corpus petitions of persons held under state process.]

*Id.* at 249.

The connection also was perceived in Gressman & Gressman, *Necessary and Proper Roots of Exceptions to Federal Jurisdiction*, 51 GEO. WASH. L. REV. 495 (1983). There, however, the perception was flawed by serious misunderstanding of the "necessary and proper" clause itself.

132. The authorization for the legislature to establish "inferior" courts had been set out as a separate resolution in the Committee of the Whole's report to the Convention on June 13, 1 RECORDS, *supra* note 30, at 231, and in the body of resolutions referred to the Committee of Detail, 2 *id.* at 133. That Committee included it separately in the enumeration of legislative powers set forth in article VII, § 1, of its report, *id.* at 181, and it stands separate in the legislative article of the finished Constitution. U.S. CONST. art. I, § 8, cl. 9.

"constitute"<sup>133</sup> additional courts should be exercised. Because such laws must qualify as "necessary and proper to carry into Execution" the constitutional provisions regarding the judicial power, this was not a grant of absolute discretion. However, the grant was ample to authorize Congress not only to resolve any otherwise unresolved problems of organization and work load allocation, but also to facilitate the judicial power in a host of other ways.<sup>134</sup>

This clause, of course, would not preclude resolution by the constitutional text itself of any particular matter with which the Convention might choose to deal. Accordingly, Randolph's outline as well as Wilson's document and the Committee of Detail's report addressed some organization and allocation problems specifically

One theretofore unresolved problem was how cases thought inappropriate for state court adjudication should be ensured a national forum. Randolph's outline provided that the "supreme" court's jurisdiction "shall be appellate only, except in those instances, in which the legislature shall make it original."<sup>135</sup> That would have allowed the legislature (not being obliged to create other federal courts) to leave even cases inappropriate for state court adjudication for commencement in state tribunals. The Committee would not countenance that much legislative discretion. Instead, to guarantee such cases a national forum regardless whether the legislature created any "inferior" federal courts, the Committee followed Wilson in borrowing an idea

---

133. The word "appoint" in the resolution as referred to the Committee of Detail, 2 RECORDS, *supra* note 30, at 133, unchanged in the Randolph notes in Committee, *id.* at 144, was changed to "constitute" in the Wilson document, *id.* at 168, and the Committee's Report, *id.* at 182. The change stirred no Convention debate; the new wording was approved "nem. con." on August 17. *Id.* at 313, 315 (records of Journal and Madison respectively); see *supra* note 88.

134. The function of Wilson's felicitous clause was so evident that it stirred scarcely a ripple of discussion when later, as part of the Committee's report, it came before the full Convention for approval. The only recorded discussion of the "necessary and proper" clause occurred on August 20, when Madison and Pinckney moved that power to "establish all offices" which might be necessary and proper be added to the authority to "make Laws." 2 RECORDS, *supra* note 30, at 337, 340, 345 (records of Journal, Journal and Madison respectively). Their concern that power to establish offices otherwise might be caviled was not shared by the other delegates, several of whom (including three Committee of Detail members) pointed out that the language as proposed by the Committee was ample to authorize creation of offices by law. *Id.* at 345 (record of Madison). The proposed additional language then was firmly voted down, and the clause agreed to without dissent. *Id.* at 337, 340, 345 (records of Journal, Journal and Madison respectively). This parliamentary episode confirms that the principal function of the "necessary and proper" clause then was perceived to be the authorization of Congress to make appropriate decisions, not dictated by the Constitution itself, for organizing the branches of the government.

In other words, at the outset its "horizontal effect" was conceived to be the paramount effect of what ought never to have been called "the sweeping clause." See Van Alstyne, *The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of the Sweeping Clause*, 40 LAW & CONTEMP PROBS. 102 (1976).

135. 2 RECORDS, *supra* note 30, at 147

from the defunct Paterson Plan.<sup>136</sup> That idea was to give "original" jurisdiction in such cases to the one national court that would certainly exist.<sup>137</sup> As the purpose was only to prevent these cases going to a state forum by default, there is no reason to regard this "original jurisdiction" language as precluding assignment at least of concurrent jurisdiction over these cases to "inferior" federal courts, should any exist.

Because the June 5 compromise presumed concurrent state court competence in all matters not guaranteed a federal forum of first instance,<sup>138</sup> another question left for the Committee to resolve was whether and to what extent "inferior" federal courts (should the legislature create them) should be competent to review state judgments in such cases. Randolph's outline foreclosed any such competence by declaring that any "inferior" federal courts could operate only "as original tribunals."<sup>139</sup> By contrast, the Wilson document<sup>140</sup> and the Committee report<sup>141</sup> made it possible for the legislature to give "inferior" courts appellate roles, with regard both to state courts and to other "inferior" federal tribunals.<sup>142</sup> Although the Convention later would choose words different from those the Committee proposed, it thus deliberately was left to Congress' discretion whether and how far any "inferior" federal courts might be given appellate competence, even over state court decisions within the subject matter parameters to be described.

There were two other matters concerning the judiciary that the Committee of Detail addressed more specifically than through the "necessary and

---

136. The Paterson Plan would have allowed only one federal tribunal, but recognized that certain cases were inappropriate for state judicial involvement. It therefore provided that such cases should be heard "in the first instance" by the one national court. See 1 *id.* at 244 (Proposition 5 of the Paterson Plan in the record of Madison). It had not previously been suggested that any original jurisdiction should be authorized for what otherwise would be an appellate national court.

137. *Id.* at 173, 186 (Wilson document and Committee report respectively). That this idea originated in the Paterson Plan suggests that it was designed, not to prevent "inferior" federal courts from originally hearing such cases if such courts *were* established, but rather to ensure that *some* federal court could originally hear them even if "inferior" courts were *not* established. It therefore is quite unwarranted to construe the grants of original and appellate jurisdiction to the "supreme" court as mutually exclusive, as Chief Justice Marshall and the Court later did in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

138. The Paterson Plan, allowing only one federal court, had contemplated that national law issues routinely would be considered in the first instance by state tribunals. That was the reason why it included a provision requiring that state courts be bound by national laws and treaties, "any thing in the respective laws of the Individual States to the contrary notwithstanding." 1 RECORDS, *supra* note 30, at 245 (Proposition 6 of the Paterson Plan in the record of Madison). This Paterson Plan provision was the prototype of the supremacy clause, first incorporated in the Convention's work product on July 17. See 2 *id.* at 22, 28-29 (records of Journal and Madison respectively). This origin of the supremacy clause tends to confirm that the Convention delegates operated consistently on the premise that state courts generally would have concurrent first instance competence in federal question cases.

139. 2 *id.* at 147.

140. *Id.* at 173.

141. *Id.* at 186.

142. See *infra* text accompanying notes 154-55.

proper" clause. The first of these was the subject matter competence of the federal judiciary as a whole. Theretofore the Convention had addressed this issue in very general terms.<sup>143</sup> The second matter addressed was what, if any, decisions of the "inferior" federal courts, if there were any, should be final, without review by any other tribunal. These two matters, and the Committee's efforts to deal with them, were intertwined.

Randolph's approach disregarded the Convention's conviction, apparent in its June 13 vote, that the subject matter jurisdiction of the federal judiciary as a whole should be constitutionally rather than legislatively defined.<sup>144</sup> His outline proposed that the "supreme" court be given jurisdiction not only over all cases arising under national laws, but also over "*such other cases, as the national legislature may assign*, as involving the national peace and harmony."<sup>145</sup> Randolph's draft further provided that "the whole or a part" of this jurisdiction "according to the discretion of the legislature may be assigned to the inferior tribunals, as original tribunals."<sup>146</sup> A second defect of Randolph's approach was that it failed to allow for finality of any "inferior" court judgments: If the "inferior" courts could be assigned jurisdiction only within the bounds of the "supreme" court's appellate reach, an appeal to the "supreme" court would be left open in *every* case they might hear.

In contrast to Randolph's proposal, Wilson's proposal enumerated the categories of "supreme" court jurisdiction without authorizing the legislature either to add to or subtract from that list of categories.<sup>147</sup> As to

---

143. See *supra* note 111 and accompanying text.

144. *Id.* It was Randolph who had made the motion approved on June 13, which this writer regards as the Convention's first expression of its conviction that the subject matter jurisdiction of the entire national judiciary should be constitutionally and not legislatively defined.

That the vote had that significance, as evidenced by the delegates' later reaffirmations of that conviction, does not mean, however, that Randolph himself conceived his motion to represent that view. Indeed, his comments at the time suggest he wished only to facilitate consideration of the subject matter parameters while postponing the problem of allocating roles, 2 RECORDS, *supra* note 30, at 238 (record of Yates), and his Committee of Detail outline might even be taken to show his personal conviction to the contrary. That Randolph remained unhappy with the Committee's (and later the Convention's) rejection of the allocation plan of his outline might be inferred from the fact that he later included "limiting and defining the judicial power" among the desired changes accounting for his refusal to sign the finished Constitution. 3 *id.* at 127 (letter of Edmund Randolph to the Speaker of the Virginia House of Delegates dated October 10, 1787).

145. 2 *id.* at 147 (emphasis added).

146. *Id.*

147. *Id.* at 172-73. Professor Amar would stress that the language neither of Randolph's outline nor of Wilson's proposal is apt to allow legislative discretion as to what he calls "first tier" or federal question cases. See, e.g., Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U.L. REV. 205 (1985). I agree; but unlike Amar, I read the Convention records as evidencing determination to *disallow* legislative discretion to omit, or divest, from the *entire* federal judiciary *even* any part of Amar's "second tier" of jurisdiction.

"inferior" courts, however, Wilson's document<sup>148</sup> and the Committee report<sup>149</sup> improved less than sufficiently upon Randolph's outline.

On the one hand, the language they used was little more apt than Randolph's to respect the Convention's June 13 vote against legislative discretion over the jurisdiction of the judiciary as a whole. Both Randolph's and Wilson's phrases can easily be read as precluding only legislative assignment of jurisdiction *beyond* the subject matters enumerated, leaving the legislature a free hand to assign *as much or as little within* those subject matters as it might choose.<sup>150</sup> That defect would be corrected by Convention action taken later.<sup>151</sup>

On the other hand, however, Wilson's proposal, unlike Randolph's, did respect the premise of the June 5 compromise that inferior federal court decisions might be made "*final . . . in many cases.*"<sup>152</sup> Copying Wilson's language<sup>153</sup> almost verbatim, the Committee report (after prescribing the "supreme" court's subject matter jurisdiction and specifying in what cases it might act in the first instance) provided:

In all the other cases before mentioned, it shall be appellate, with such exceptions and under such regulations as the Legislature shall make. The Legislature may assign any part of the jurisdiction above mentioned . . .<sup>154</sup> in the manner, and under the limitations which it shall think proper, to such Inferior Courts, as it shall constitute from time to time.<sup>155</sup>

This passage must be considered with particular care. Its first sentence is the first appearance, in any records surviving the Convention, of language resembling the so-called "exceptions" clause of what ultimately became the Constitution's article III.<sup>156</sup> That sentence (and its counterpart in the finished

148. 2 RECORDS, *supra* note 30, at 173.

149. *Id.* at 186-87.

150. "The Legislature may (distribute) <assign any part of> th(is)e Jurisdiction <above mentd.,—except the Trial of the Executive—>, in the Manner and under the Limitations which it shall think proper (among) <to> such (other) <inferior> Courts as it shall constitute from Time to Time." *Id.* at 173 (emphasis in original). The words in angle brackets take the place of those in parentheses in this language as it appears in the Committee report. *Id.* at 186-87.

151. See *supra* note 111.

152. 1 RECORDS, *supra* note 30, at 124 (record of Madison).

153. See 2 *id.* at 173 (record of the Committee of Detail). It is interesting that Wilson's document, evidently a product of Committee deliberations rather than his personal views, countenanced a terminal appellate role for "inferior" federal courts notwithstanding his preference for a pyramidal judicial system.

154. The words deleted at this ellipsis concerned the supreme court's role in impeachments, which were later eliminated by the Convention. *Id.* at 39, 423, 547, 46, 431, 552-53 (footnote added) (The first three page citations are from the records of Journal and the following three are from the records of Madison.).

155. *Id.* at 186-87.

156. The language first appears in the handwriting of James Wilson in the document he prepared for the Committee of Detail. See *id.* at 163 n.17.



Constitution), however, is seriously misunderstood when its original context is overlooked.

As a simple matter of rhetoric, the "exceptions" phrase in the first sentence is not a conferral of power; it is an *allusion* to power *elsewhere* conferred.<sup>157</sup> It would have been anomalous for this Committee, which originated and otherwise carefully adhered to the principle of "enumerated" powers, to propose conferring such a significant power upon the legislature by indirection. In the Committee of Detail report, the *conferral* of power thus alluded to was accomplished by two other clauses, which were written in the appropriate rhetorical form.

One of these was the sentence immediately conjoined: "The Legislature may assign any part of [the 'supreme' court's] jurisdiction . . . to such Inferior Courts . . ."<sup>158</sup> That particular provision was not entirely adequate to the purpose,<sup>159</sup> and eventually it was stricken;<sup>160</sup> its enduring importance is that it evidences an awareness that the mere allusion in the "exceptions" clause does not by itself confer any power.

The other provision authorizing the legislature to allocate "the judicial Power of the United States," by virtue of which the legislature could make "exceptions" as well as "regulations" regarding the appellate jurisdiction of the "supreme" court, was the provision already discussed that ultimately became the "necessary and proper" clause of article I, section 8.<sup>161</sup> This power under the "necessary and proper" clause is the *only* power given to Congress to make laws concerning operations of the judiciary, apart from the power separately given it to "constitute" inferior tribunals.<sup>162</sup> As to

---

157. There is another example of this rhetorical form in the judiciary provisions. Article XI, § 1, of the Committee report alluded to "such inferior Courts as shall, when necessary, from time to time, be constituted by the Legislature." 2 *id.* at 186. Article XI, § 1, of the Committee report was patterned after the first paragraph of article 14 of the Wilson document. *Id.* at 172. The power to create those courts was conferred in article VII, § 1, clause 10, of the Committee report in appropriate rhetorical form: "The Legislature shall have the power [t]o constitute tribunals inferior to the Supreme Court . . ." *Id.* at 181-82. Article VII, § 1, clause 10, of the Committee report was patterned after the first paragraph of article 8 of the Wilson document. *Id.* at 168. This rhetorical structure of course survives in the Constitution as adopted. See U.S. CONST. art. I, § 8, cl. 9 and art. III, § 1.

158. 2 RECORDS, *supra* note 30, at 186-87.

159. Some such provision was needed in Wilson's draft, but ceased to be crucial once the reference was changed from the "supreme" court to the federal judiciary as a whole. The language tendered by Wilson, however, was inadequate in that it failed to authorize "regulation" of, as distinguished from "exceptions" to, the "supreme" court's jurisdiction. Moreover, because the jurisdiction referred to was for the most part appellate, and an "assignment" of any part of it might arguably be exclusive, this sentence could be criticized as contemplating that *all* "inferior" court judgments might be made "final" whereas the compromise of June 5 had contemplated only that "*many*" of them might be.

160. The sentence was stricken by 8-0 vote on August 27. 2 RECORDS, *supra* note 30, at 425, 431 (records of Journal and Madison respectively).

161. See *supra* text accompanying notes 126-30.

162. U.S. CONST. art. I, § 8, cl. 9; see *supra* notes 88 & 133.

powers vested in non-legislative departments or officers, it is well understood that this "necessary and proper" clause operates only as a one-way ratchet: Congress can make laws "for carrying into Execution" the other branches' powers, but cannot make laws to obstruct or interfere. The ratchet character of this clause is the key to understanding why, in addition to the "necessary and proper" clause itself, the "exceptions" clause was essential to accomplishing the Committee's and the Convention's design.

Without the "exceptions" clause, the Committee's language quoted above would have meant not only that the "judicial power" as to the several subject matters described should be vested in the judiciary, but also that it should be exercisable "in all cases" by the "supreme" tribunal, at least on appeal. Legislation *depriving* the "supreme" court of some appellate competence then would be a pro tanto negation of the "supreme" court's constitutionally ordained power, and as such could hardly qualify as "carrying into Execution" the power contemplated for that court by the Constitution. In the absence of the "exceptions" clause, in other words, the "necessary and proper" clause would have prevented, rather than assisted in, implementing the premise of the June 5 compromise, that the judgments of "inferior" courts (should any be created) might be made "*final . . . in many cases.*"

Inserting the "exceptions" clause made it permissible for the legislature to repose less than the full scope of the "judicial power" in the one so-called "supreme" court, *provided* the legislature exercised its option to create other courts as well.<sup>163</sup> The "judicial power" thus could be "carried

---

163. It seems never to have been contemplated that Congress, by making "exceptions," should be able to preclude "supreme" court review of eligible cases for which no "inferior" federal tribunal was provided. In the weeks before the Committee of Detail set to work the Delegates uniformly had stressed their insistence upon an independent federal judiciary with defined subject matter competence, and on August 27 they had emphatically insisted that this competence be insulated from legislative control. See *supra* note 111. If the "exceptions" clause were conceived as enabling the legislature to exclude from the *whole* national judiciary any fraction of the subject matter to be constitutionally prescribed, one should expect to find at least some faint ripple of discontent with this anomaly.

Moreover, the contrary understanding is evident from the fact that those few who thought it desirable to repose such discretion in the legislature found it necessary to propose other language to do so, and their proposals were soundly defeated. (Indeed, the Convention even deleted some of the legislative discretion over jurisdiction in other respects that the Committee's language clearly would have allowed.)

On this record, it is absurdly indefensible to construe the "exceptions" clause as giving Congress an avulsive power capable of being used for more than a reallocation of assignments among federal courts, to eliminate any fraction of subject matter jurisdiction from the judicial branch as a whole.

It should be noted that we thus have arrived, in somewhat streamlined fashion, at the same conclusion urged by Professor Robert Clinton. See Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV. 741 (1984).

into execution" just as much by parceling it out among several federal courts, as by vesting it all in one. While it was made mandatory that the whole described "judicial Power" reside in the national judiciary, it would be constitutionally immaterial whether the power were vested in one or another (or in several at once) of the various tribunals which might comprise that judiciary.<sup>164</sup> Because of the "exceptions" clause, a law restricting the "supreme" court's appellate jurisdiction could be regarded as curtailing rather than "carrying into execution" the "judicial Power" *only if no other* federal tribunal were provided where the excepted fractions of that power could reside.

Because the jurisdictional terms of article III<sup>165</sup> are not self-executing,<sup>166</sup> no federal court can be competent in any subject matter until Congress, pursuant to the "necessary and proper" clause, has vested that competence by law. Beyond the original investiture, this clause enables Congress to reallocate jurisdiction among federal courts. However, any attempt to eliminate entirely any vested fraction of subject matter jurisdiction would be an attempt to curtail rather than to "carry into execution" the "judicial Power" prescribed by article III.<sup>167</sup>

---

164. Immaterial, that is, as to all cases except those designated for origin in the "supreme" court.

165. With the possible exception of those describing an "original" jurisdiction for the one court labeled "supreme."

166. Otherwise the entirety of article III jurisdiction (even that part marked as original for the Supreme Court, unless that original were to be also exclusive) would inexorably vest in every federal court created, and neither specialization nor structural arrangement would be possible.

167. Constitutional scholars heretofore have overlooked the judicial response on the *one* occasion when Congress attempted to divest jurisdiction *entirely*. To prevent further embarrassment by judicial decisions invalidating and condemning military measures taken in loyal states during, or in former rebel states after, the Civil War, the Reconstruction Congress acted to divest *all* courts of jurisdiction over any case arising out of military actions taken between Lincoln's inauguration and July 1, 1866, fifteen months after the War's end. Act of Mar. 2, 1867, ch. 155, 14 Stat. 432.

Thus divestment statute was ignored by the circuit courts, which continued giving relief in such cases. *E.g.*, *Milligan v. Hovey*, 17 F. Cas. 380 (C.C.D. Ind. 1871) (No. 9,605). In *Beckwith v. Bean*, 98 U.S. 266 (1878), a circuit court's disregard of the divestment statute was one of the purported errors claimed by the Attorney General seeking reversal of a damages award. The Supreme Court majority in *Bean* declined to discuss that issue, and reversed on a different ground, *id.* at 285; but they reversed *for a new trial* whereas the divestment statute, if deemed valid, would have eliminated subject matter jurisdiction. Justices Field and Clifford, dissenting on the other ground and thus compelled to address the divestment issue, held the statute unconstitutional. *Id.* at 285-306. The remand *for new trial* in *Bean*, as well as majority opinions in other cases from the same period, indicate that had they chosen to discuss it in *Bean* the other Justices would have agreed that the divestment statute was unconstitutional. *See, e.g.*, *Raymond v. Thomas*, 91 U.S. 712 (1876).

The familiar case of *Ex parte McCardle*, 73 U.S. (6 Wall.) 318 (1868), is not to the contrary. The 1867 divestment statute did not apply in *McCardle* (and thus was not addressed), because the facts had arisen after July 1, 1866, the cutoff date of that statute. The very different Act of Congress applied in *McCardle* merely determined which court or courts could consider certain kinds of cases; it did not attempt to divest a subject matter category of jurisdiction entirely from the judiciary as a whole.

At the same time, there are no impediments whatever<sup>168</sup> to Congress' discretion in deciding whether and how to fix lines of review. This is not only because of the "exceptions" clause but also because the June 5 compromise confirms that the terms "supreme" and "inferior," as used in the Constitution, bear no hierarchical meaning at all.

It is difficult to conceive how a draftsman, with appropriate conciseness, could better have authorized the legislature to organize the judiciary and to allocate its work load, while ensuring that the jurisdiction of the judiciary as a whole would be constitutionally rather than legislatively prescribed. The Committee's combination of "necessary and proper" and "exceptions" clauses perfectly suited the purpose. The whole Convention, in turn, approved and affirmed the Committee's work in this respect; and the Constitution contemplates for Congress just this much power.

### VIII. CONFIRMATION FROM THE FEDERALIST

Alexander Hamilton, a New York delegate present for the discussion and voting on June 5,<sup>169</sup> was also a member of the Committee on Style and Arrangement appointed in September to compose the final document in accord with the Convention's resolves. A careful reading of his contributions to *The Federalist Papers* confirms that Hamilton understood the Constitution to leave to Congress the power to decide whether and to what extent the federal judiciary should be pyramidal in form.

Hamilton's principal discussions of the judiciary appear in *The Federalist Papers Numbers 80, 81 and 82*.<sup>170</sup> There he argued against tolerating

---

168. Congress may not divest the Supreme Court of original jurisdiction in the cases constitutionally specified; but it is not precluded from giving other federal courts *concurrent* original (and, if it wishes, the Supreme Court appellate) competence in those cases. See *supra* note 137.

169. The New York delegation divided that day, both in the vote on Rutledge's motion to bar "inferior" tribunals and in the vote on the Madison-Wilson compromise. 1 RECORDS, *supra* note 30, at 125 (record of Madison). What we know in general of their respective opinions suggests it was Hamilton, rather than New York's other two delegates, who inclined Madison's way on these points.

170. Earlier, in *The Federalist Paper Number 22*, Hamilton had discussed the particular problem of judicial construction of *treaties* which might come into litigation. There he urged that treaty cases no longer be left (as under the Articles of Confederation) to variant determination by the thirteen state judiciaries, because international respect and confidence depended upon "uniformity in these determinations"; and he reasoned that the tribunal of last instance for treaty cases "ought to be instituted under the same authority which forms the treaties themselves." THE FEDERALIST No. 22, at 143 (A. Hamilton) (J. Cooke ed. 1961).

In pressing this point, Hamilton uttered a generalization which (as demonstrated earlier in this Article) was untrue not only of England, but of Hamilton's own New York and most of the other American states at the time, and which also went far beyond matters of international import:

To avoid the confusion which would unavoidably result from the contradictory decisions of a number of independent judicatories, all nations have found it

differences as to federal law attributable to final *state* court decisions;<sup>171</sup> but he also displayed a full understanding of the premise underlying the June 5 compromise.

Hamilton reasoned that the possibility of parochial bias, and the insufficiency of judicial independence in some states, made it perilous to trust state courts "for an inflexible execution of the national laws,"<sup>172</sup> so that insofar as state courts were to decide points of federal law there must be abundant opportunity for federal appellate review. The way he put the argument is important:

[I]f there was a necessity for confiding the original cognizance of causes arising under [federal] laws to [state courts], there would be a correspondent necessity for leaving the door of appeal [to some federal tribunal] as wide as possible. In proportion to the grounds of confidence in, or diffidence of the subordinate tribunals, ought to be the facility or difficulty of appeals.<sup>173</sup>

His putting the argument this way is important because Hamilton also acknowledged that appeals delay justice and entail added costs both for litigants and for the public; and he said: "I should consider every thing calculated to give in practice, an *unrestrained course* to appeals as a source of public and private inconvenience."<sup>174</sup>

Hamilton suggested that a "highly expedient and useful" way to limit this inconvenience, without neglecting the "necessity for leaving the door of appeal as wide as possible" from *state* court rulings on federal law cases, would be to divide the nation into several districts and have a *federal* court in each.<sup>175</sup> Then, he reasoned, "Justice through them may be administered with ease and dispatch; and *appeals may be safely circumscribed* within a

---

necessary to establish one court paramount to the rest—possessing a general superintendence, and authorized to settle and declare in the last resort, an uniform rule of civil justice.

*Id.* at 143-44.

The Constitution does make *possible* what Hamilton noted as lacking under the Articles of Confederation: recourse "in the last resort, to one SUPREME TRIBUNAL" for *treaty* cases. *Id.* at 143. It also makes that *possible* for other federal law (but not state law) cases. However, it does not *require* that the forum of last resort be not only national, but a single "paramount" national court. The rhetoric of his inaccurate over-generalization in *Number 22* might well indicate that Hamilton preferred a pyramidal scheme, at least for treaty cases; but it should not be taken to gainsay what he wrote five months later when discussing the judiciary more fully in *Numbers 80, 81 and 82*.

171. "The mere necessity of uniformity in the interpretation of the national laws, decides the question. Thirteen independent courts of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government, from which nothing but contradiction and confusion can proceed." THE FEDERALIST No. 80, at 535 (A. Hamilton) (J. Cooke ed. 1961).

172. *Id.*, No. 81, at 547 (A. Hamilton).

173. *Id.*

174. *Id.* (emphasis in original).

175. *Id.*

very narrow compass."<sup>176</sup> Appeals from these several *federal* courts could be safely circumscribed, because there could be greater confidence in them than in state courts with respect to federal law cases.

In the last paragraph of *Number 82*, Hamilton expressly discussed using "inferior" federal courts for appeals from state courts on federal law issues. Among the "many advantages" of doing so, he observed, was that it

would admit of arrangements calculated to contract the appellate jurisdiction of the supreme court. The state tribunals may then be left with a more entire charge of federal causes; and appeals in *most* cases in which they may be deemed proper *instead of* being carried to the supreme court, may be made to lie from the state courts to district courts of the union.<sup>177</sup>

Thus did Hamilton exactly endorse the design of the June 5 compromise.<sup>178</sup> At the option of Congress, *several* federal tribunals, "with *final* jurisdiction in *many* cases," could ensure that state bias would not warp federal justice, and at the same time prevent the delay and expense of appeals to the distant "supreme" court.

The possibility of disuniformity due to divergent decisions of these several *federal* courts might have seemed less substantial in that era, before law *making* by judges was plainly acknowledged and avowed. In any event, if that possibility occurred to Hamilton at all he thought it not to warrant discussion.

## IX. THE 1789 JUDICIARY ACT

The most striking characteristic of the Judiciary Act of 1789<sup>179</sup> (the "Judiciary Act") is that it *dispersed* not only first instance but also final competence, *ignoring* the so-called "rules of judicial architecture" expounded in James Wilson's lectures.<sup>180</sup> Instead of erecting a judicial pyramid, the First Congress effectuated the Convention's June 5 compromise by ensuring that decisions of "inferior" national tribunals would be "*final* . . . in *many* cases."

176. *Id.* at 547-48 (emphasis added).

177. *Id.*, No. 82, at 557 (A. Hamilton) (emphasis added).

178. There also is more subtle evidence of Hamilton's expectation that ultimate recourse to one central national tribunal would *not* be the rule. Discussing in *Number 78* the role of the national judiciary in checking state and federal violations of constitutional limitations, Hamilton repeatedly used the plural term, "courts." *Id.*, No. 78, at 523, 524 (A. Hamilton) (emphasis added). And again in *Number 80* he observed that "[c]ontroversies between the nation and its members or citizens, can only be properly referred to the national tribunals," again using the plural. *Id.*, No. 80, at 535 (A. Hamilton) (emphasis added).

179. Judiciary Act, *supra* note 28. For an account of the course of the bill through Congress, see D. HENDERSON, *COURTS FOR A NEW NATION* 20-26 (1971).

180. See *supra* text accompanying note 25.

Recognizing the disruptive potential of inconsistent *state* court dispositions of cases within the scope of article III subject matter jurisdiction, Congress made it possible for *all* such cases to be determined in *some* federal court.<sup>181</sup> What the Judiciary Act contemplated, however, was determination not by any single one, but rather by *one or another* of the federal courts: the First Congress declined to establish any mechanism to ensure that decisions of the several *federal* tribunals would be consistent or uniform. It gave highest priority, instead, to curtailing the risk of "vexatious appeals," by severely limiting the availability of Supreme Court review

The attitude that apparently prevailed toward appellate review within the federal court structure was best articulated by Oliver Ellsworth, principal draftsman of the Judiciary Act, five years later and after he had become Chief Justice. Ellsworth observed: "[S]urely, it cannot be deemed a denial of justice, that a man shall not be permitted to try his cause two or three times over. If he has one opportunity for the trial of all the parts of his case, justice is satisfied";<sup>182</sup> and, continued Ellsworth, even if *no* appellate review of federal court decisions had been provided (*even as to purported errors of law*), "no denial of justice could be imputed to our government."<sup>183</sup>

The Constitution had authorized appellate jurisdiction for the Supreme Court "both as to Law and Fact";<sup>184</sup> yet the Judiciary Act did not authorize it to review facts at all. The Supreme Court's appellate authority was confined by the Judiciary Act to a process familiar in English practice, called "writ of error." The Supreme Court had no jurisdiction at all by way of "appeal," in the technical sense of that word. The difference was explained in an early treatise:

The writ of error submits to the revision of the Supreme Court only the law; but the remedy by appeal brings before the Supreme Court the facts as well as the law. It may correct on an appeal, not only wrong

---

181. As to the jurisdiction given federal courts over federal question cases, see Engdahl, *Federal Question Jurisdiction Under the 1789 Judiciary Act*, 14 OKLA. CITY U.L. REV. 521 (1990).

The "disruptive potential" noted in the text would not hold true, of course, for cases only within the diversity jurisdiction; nonetheless the First Congress vested jurisdiction in such cases, with no substantial exception but the "assignee clause" enforced in *Turner v. Bank of North America*, 4 U.S. (4 Dall.) 8 (1799).

182. *Wiscart v. Dauchy*, 3 U.S. (3 Dall.) 321, 329 (1796).

183. *Id.*

184. U.S. CONST. art. III, § 2, cl. 2. The distinction between fact and law for review purposes was first made by the Paterson Plan, which contemplated only one national court with virtually all litigation commencing in state courts. It proposed that in state court proceedings to enforce national revenue and commercial regulations the national court have power "for the correction of all errors, both in law & fact in rendering judgment," 1 RECORDS, *supra* note 30, at 243 (Proposition 2 of the Paterson Plan in the record of Madison), but that in all other proceedings the national court's review reach errors in law only, not errors in fact. *Id.* at 244 (Proposition 5 of the Paterson Plan in the record of Madison).

conclusions of law from the facts, but wrong conclusions of fact from the evidence.<sup>185</sup>

This restriction of Supreme Court review cannot be explained merely by reference to the ratification uproar over possible review of *jury* findings of fact, the uproar which led to the seventh amendment. The Judiciary Act allowed only "writ of error" review even in equity, admiralty and maritime cases, where no jury would be involved.<sup>186</sup>

At that time it was routine, even with juries involved, for trial courts to sit with more than one judge. The Judiciary Act departed from this tradition by providing that the district courts (to which it gave very limited jurisdiction) should be staffed by single judges sitting alone. The resulting risk of idiosyncratic rulings was moderated, as to most district court decisions, by authorizing review in one of the multi-judge circuit courts. However, no direct Supreme Court review of cases commenced in district courts was provided.<sup>187</sup> And further, of those district court matters reviewable even by circuit courts,<sup>188</sup> none but admiralty and maritime matters could proceed thence to the Supreme Court.

In other words, excepting those within the admiralty and maritime jurisdiction, for every case commenced in a federal district court either that court or a circuit court was the end of the road.<sup>189</sup>

Even as to the circuit courts, which were the principal federal trial tribunals, review by the Supreme Court was not generally allowed.<sup>190</sup> No

185. T. SERGEANT, CONSTITUTIONAL LAW 43 (1822). Subsequent statutory changes altered the process for Supreme Court review. See *id.* at 41-43.

186. Judiciary Act, *supra* note 28, § 22; see *Jennings v. The Brig, Perseverance*, 3 U.S. (3 Dall.) 336 (1797); *Wiscart*, 3 U.S. (3 Dall.) 321. In contrast, the Judiciary Act allowed *circuit* courts to review *district* court admiralty and maritime determinations both as to law and fact, for that review was to be by way of "appeal." Judiciary Act, *supra* note 28, § 21.

187. There was one exception to this rule: The district courts for the Maine and Kentucky districts were given circuit court powers, and from Kentucky (but not from Maine) writs of error were to lie to the Supreme Court in the same causes as from a circuit court. Judiciary Act, *supra* note 28, § 10. Although the language in § 10 provided that "appeals" as well as writs of error should lie from the Kentucky district to the Supreme Court in the same causes as from a circuit court, by virtue of § 13 and § 22 no circuit court judgment could be reviewed by "appeal" as distinguished from "writ of error."

188. The Judiciary Act did not provide for review of district court equity decrees, because it gave the district courts no equity jurisdiction at all. See *id.* § 9.

189. See, e.g., *United States v. Lawrence*, 3 U.S. (3 Dall.) 42, 53-54 (1795).

190. Of course, the Supreme Court was authorized to review by writ of error final judgments of *state* courts against any party's reliance on a federal constitutional, statutory or treaty provision. Judiciary Act, *supra* note 28, § 25.

Plainly the Constitution contemplated Supreme Court review of state court cases that were within the subject matter descriptions but outside the original jurisdiction of that Court; otherwise, had Congress opted to create no other federal courts there would have been no Supreme Court appellate jurisdiction. The tardy state objections to § 25 review dealt with in *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816), and *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821), were therefore groundless.

As to review of eligible *state* court cases the Judiciary Act included a significant restriction



Supreme Court review was available for *any* criminal case.<sup>191</sup> The only *non*-criminal circuit court decisions<sup>192</sup> eligible for Supreme Court review were those made in: (1) admiralty and maritime cases reviewed by a circuit court on "appeal" from a district court;<sup>193</sup> (2) cases removed from a state court to a circuit court for trial; and (3) cases originally commenced in a circuit court.<sup>194</sup>

---

having no counterpart in § 22 (which dealt with review of *federal* court decisions):

[N]o other error shall be assigned or regarded as a ground of reversal in any such case as aforesaid, than such as appears on the face of the record, and immediately respects the before mentioned questions of validity or construction of the said constitution, treaties, statutes, commissions, or authorities in dispute.

Judiciary Act, *supra* note 28, § 25.

There was no provision for Supreme Court review of state court judgments *upholding* purported federal law claims or defenses, regardless how erroneous any such judgment might be; but this could be significant only to a loser unable to show that in upholding his adversary's claim of federal right the state court had ruled against his own. Neither did the Judiciary Act allow Supreme Court review of diversity cases tried in state courts: Instead it made the circuit courts available for such cases—but only originally or on removal before trial, not for review after judgment. *Id.* §§ 11, 12.

191. Supreme Court review was provided only for circuit court "final judgments and decrees in civil actions, and suits in equity." Judiciary Act, *supra* note 28, § 22. As Ellsworth explained, the term "civil actions" was employed "to exclude the idea of removing judgments in criminal prosecutions, from an inferior to a superior tribunal." *Wiscart*, 3 U.S. (3 Dall.) at 328. Use of the same phrase in § 22 equally precluded circuit court review of district court criminal cases.

In one 1803 case, *United States v. Simms*, 5 U.S. (1 Cranch) 252 (1803), the Supreme Court did review on writ of error (and affirm) the judgment of a circuit court in a criminal case. Its jurisdiction to do so, however, had not been challenged in that case; and just a few days later, in another criminal case, the Court raised the jurisdictional defect *sua sponte* and quashed the writ of error notwithstanding manifest error on the record. *Clarke v. Bazadone*, 5 U.S. (1 Cranch) 212 (1803). *Clarke* had come up from the General Court of the Northwest Territory; but two years later the Justices similarly dismissed for lack of jurisdiction the writ of error in a circuit court criminal case. *United States v. More*, 7 U.S. (3 Cranch) 159 (1805).

Section 14 of the Judiciary Act authorized *all* federal courts to issue writs of habeas corpus, and thus the Supreme Court could hear habeas petitions even of persons held pursuant to orders of "inferior" federal courts. See *United States v. Hamilton*, 3 U.S. (3 Dall.) 17 (1795). After the article III distinction between "original" and "appellate" had been misconstrued in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), the Justices characterized such habeas proceedings as "appellate." *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807). Even as so characterized, however, its habeas jurisdiction did not enable the Supreme Court to question the legal, any more than the factual, merits of conviction by a competent "inferior" court. See *Ex parte Watkins*, 28 U.S. (3 Pet.) 193 (1830).

192. The Supreme Court could not review decisions of courts in the Northwest Territory. See 1 J. KENT, COMMENTARIES ON AMERICAN LAW 324 (3d ed. 1836) (citing *Clarke*, 5 U.S. (1 Cranch) 212).

193. District court decisions *not* in admiralty or maritime matters were reviewable by circuit courts only on writ of error, not by "appeal." Judiciary Act, *supra* note 28, § 21; *cf. id.* § 22. Therefore circuit court dispositions of such cases were not eligible for Supreme Court review at all. See *infra* note 194.

194. Judiciary Act, *supra* note 28, § 22.

To sustain a writ of error from the Supreme to the Circuit Court, the judgment in the latter, must be a judgment in a suit originally brought there, or removed thither from a State Court. It does not lie upon a judgment rendered in the

Where the Judiciary Act did not totally preclude review (for example, in civil cases originating in circuit courts), it still interposed a substantial impediment:<sup>195</sup> The Supreme Court could review no circuit court judgment unless more than \$2,000 was at stake.<sup>196</sup> In stark contrast, *circuit* courts could review *district* court judgments so long as more than \$300 in admiralty and maritime causes,<sup>197</sup> or \$50 in other civil actions,<sup>198</sup> was in controversy.

Because "amount in controversy" limitations long had been applicable to certain courts in England,<sup>199</sup> and were accepted features of the judicial establishments of American states,<sup>200</sup> this requisite might be thought worthy of little remark. However, \$2,000 was a great deal of money in those days: Few persons could earn that much money in a year.<sup>201</sup> This extraordinarily high amount in controversy requisite was deliberately calculated to curtail substantially the Supreme Court's appellate role.

This access limitation very nearly was included in the proposed "Bill of Rights." James Madison, ascertaining that the compromise he had induced

Circuit Court in a cause brought from the District to the Circuit Court by writ of error; for the 22d section of the act of September 24th, 1789, allows a writ of error from the Supreme to the Circuit Court, only in civil actions that are brought there by original process, or removed from the Courts of the several states.

T. SERGEANT, *supra* note 185, at 31.

195. In addition, the Judiciary Act provided that there shall be no reversal on such writ of error for error in ruling any plea in abatement, other than a plea to the jurisdiction of the court, or such plea to a petition or bill in equity, as is in the nature of a demurrer, or for any error in fact.

Judiciary Act, *supra* note 28, § 22.

196. *Id.* In contrast, there was no amount in controversy prerequisite to Supreme Court review of state court judgments. *Id.* § 25.

197. *Id.* § 21.

198. *Id.* § 22.

199. See 4 W. BLACKSTONE, *supra* note 40, at 20-43.

200. See J. GOEBEL, *supra* note 62, at 9-10, 29-31, 33-35. As to Virginia, also see Tucker, Appendix, *supra* note 63, at 1-30.

201. One measure of comparison is the salaries afforded various federal officials at that time. Two thousand dollars was more than the annual salary of the district judges, and more than twice the annual salary of the chief clerks in the Departments of State and War. Supreme Court Associate Justices were paid only \$3,500 per year, as were the Secretaries of the Treasury and of State; the Secretary of War was paid only \$3,000. The Attorney General's salary was only \$1,500 per year, although as noted by L. BAKER, *supra* note 61, at 168, and J. GOEBEL, *supra* note 62, at 726, he might supplement this with fees from private practice. See generally Act of Sept. 11, 1789, ch. 13, § 1, 1 Stat. 67; Act of Sept. 23, 1789, ch. 18, § 1, 1 Stat. 72.

As late as 1801, judges in some states were paid only \$500 per year. See 10 ANNALS OF CONG. 900 (1800) (remarks of Congressman Claiborne). Critics considered the \$2,000 salary proposed for the new federal judgeships authorized in 1801 an extravagant sum. See *id.* at 900-05.

At the turn of the century a successful lawyer in full-time private practice might earn as much as \$4,000 per year. See *id.* at 905 (remarks of Congressman Bayard). One held in such high regard as John Marshall might earn even \$5,000, see L. BAKER, *supra* note 61, at 166, but that was a tidy sum, indeed.

at the Convention was insufficient to allay popular fears of the oppressive cost of appeals,<sup>202</sup> included among the amendments he urged upon the First Congress one to fix an amount in controversy requisite for Supreme Court review. As he explained:

Great inconvenience has been apprehended to suitors from the distance they would be dragged to obtain justice in the Supreme Court of the United States, upon an appeal on an action for a small debt. To remedy this, declare that no appeal shall be made unless the matter in controversy amounts to a particular sum

203

The proposed constitutional amendments approved by the House on August 24, and forwarded for Senate concurrence, included this \$1,000 amount in controversy provision.<sup>204</sup> But the Senate committee, simultaneously drafting the Judiciary Act,<sup>205</sup> had included in their draft a \$2,000 requisite having the same purpose and effect, although limited to cases tried in a federal court.<sup>206</sup> The Senate preferred the statutory approach, because the judiciary bill authorized no *other* federal court to review potentially disparate *state* court rulings in federal question cases and the senators anticipated that the more comprehensive barrier portended by the proposed constitutional amendment might therefore produce "embarrassments."<sup>207</sup>

202. Anticipating wealthy litigants' recourse to the distant Supreme Court where men of small means could not afford to defend, George Mason had charged that the judiciary provisions would render "justice as unattainable by a great part of the community, as in England; enabling the rich to oppress and ruin the poor." PAMPHLETS, *supra* note 96, reprinted in 1 B. SCHWARTZ, *supra* note 96, at 445 (comments of George Mason).

Beyond recalling that preventing such abuse was a reason he urged "*final*" jurisdiction for "inferior" tribunals, *see supra* notes 96-97 and accompanying text, Madison then pledged to support amendments including such as might be deemed adequate "to put the judiciary department into such a form as will render vexatious appeals impossible." Letter from James Madison to George Eve (Jan. 2, 1789), reprinted in 2 B. SCHWARTZ, *supra* note 96, at 997.

203. 1 ANNALS OF CONG. 458 (1789), reprinted in 2 B. SCHWARTZ, *supra* note 96, at 1033.

204. The committee to which Madison's proposals were referred decided \$1,000 would be an appropriate figure; later, in the Committee of the Whole House, an amendment to \$3,000 was proposed but defeated. 2 B. SCHWARTZ, *supra* note 96, at 1113.

205. Madison had introduced his proposed amendments in the House several days before Ellsworth's Senate committee reported its judiciary bill. Afterwards, but before it was considered by the Senate itself, he somehow secured a copy of the judiciary bill draft. *See* Warren, *supra* note 29, at 64 n.35.

206. Virginian Richard Henry Lee, a member of the Senate committee, wrote optimistically to a friend in the midst of the committee's work that the committee would propose a system "free from those vexations and abuses" feared. *Id.* at 62-63. His optimism appears attributable to the committee's \$2,000 amount in controversy prerequisite for review of circuit court decisions. Lee did say, however, that he would be happier if that protection were provided by constitutional amendment. *Id.* at 62-63.

207. When the House-passed proposals for constitutional amendments were debated in the Senate, it first was moved to replace the amount in controversy amendment with one pertaining only to diversity cases, but trebling the minimum to \$3,000 for the Supreme Court and setting it at \$1,500 for all others; then the Senate voted to delete the amount in controversy provision entirely from the proposed "Bill of Rights." *See* 2 B. SCHWARTZ, *supra* note 96, at 1149-50.

Writing to a friend concerning this Senate action, Madison lamented that "[a] fear of

Whether by "Bill of Rights" provision or statute, however, the very large amount in controversy prerequisite to review of decisions made by other *federal* courts was not designed to lighten the Supreme Court's work load or to free its docket of inconsequential concerns. Rather, it was calculated to guarantee litigants with modest resources, or where modest amounts were at stake, final and unappealable ends to their ordeals of litigation in tribunals reasonably proximate to their homes.

Statistics from the earliest period demonstrate a consequence of the First Congress' rejection of the pyramidal judiciary model: Most federal court litigation began, *and almost all of it ended*, in the circuit courts.<sup>208</sup> Of 3,111 cases decided in circuit courts between 1790 and 1797, only twenty went on to the Supreme Court. Fifteen of these were in admiralty,<sup>209</sup> where satisfaction of the \$2,000 amount in controversy requirement could seldom present a practical problem. Even including cases on writ of error to *state* courts, Professor Goebel's careful search could find only 79 appellate cases disposed of by the Supreme Court prior to 1801.<sup>210</sup> In contrast, by 1801 approximately 10,000 cases had been decided by the circuit and district courts combined,<sup>211</sup> approximately 6,800 of them by circuit courts.<sup>212</sup> Even allowing for litigant

inconvenience from a constitutional bar to appeals below a certain value, and a confidence that such a limitation is not *necessary*," had caused the Senate to strike the provision. Letter from James Madison to Edmund Pendleton (Sept. 14, 1789) (emphasis in original), *reprinted* in 2 B. SCHWARTZ, *supra* note 96, at 1157. Several days later he explained further:

It will be impossible I find to prevail on the Senate to concur in the [proposed constitutional] limitation on the *value* of appeals to the Supreme Court, which they say is unnecessary, and might be embarrassing in questions of national or Constitutional importance in their principle, tho' of small pecuniary amount.

Letter from James Madison to Edmund Pendleton (Sept. 23, 1789) (emphasis in original), *reprinted* in 2 B. SCHWARTZ, *supra* note 96, at 1166.

Madison's proposed constitutional amendment could have seemed "unnecessary" to those senators concerned about "vexatious appeals" only because the amount in controversy restriction included in their judiciary bill had the very same purpose and effect, while avoiding potential "embarrassment" by interposing *no* amount in controversy barrier to Supreme Court review of federal questions decided by the courts of the *states*.

Goebel points out that in the Senate version of the judiciary bill the \$2,000 requisite literally applied only to cases that had been removed to circuit from district courts, and not to cases originating in circuit courts or removed thence from state courts. J. GOEBEL, *supra* note 62, at 479, 497. The change in wording to apply the high monetary requisite more broadly was accomplished in the House. *Id.* at 505-06. Whether this particular change was merely an adjustment in wording to effect the original Senate intent, as apparently believed by Warren, *see* Warren, *supra* note 29, at 130 n.178, or a deliberate change of substance, as Goebel concludes, J. GOEBEL, *supra* note 62, at 505-06, is perhaps debatable.

208. "An overwhelming majority of the cases terminated at the trial stage" J. GOEBEL, *supra* note 62, at 589.

209. D. HENDERSON, *supra* note 179, at 89.

210. J. GOEBEL, *supra* note 62, at 665.

211. D. HENDERSON, *supra* note 179, at 3.

212. According to Dwight Henderson, 3,111 cases were decided in circuit courts between 1790 and 1797, *id.* at 89, and 3,785 during the Adams Administration of 1797-1801. *Id.* at 115. These figures total 6,896 cases, but Henderson elsewhere says the circuit courts decided

discretion not to seek Supreme Court review in cases where it might have been had, these statistics confirm that the Judiciary Act did not establish a pyramidal scheme.

Furthermore, rejection by the First Congress of the pyramidal model is evident from more than its miserly allowance of Supreme Court appellate review. The Judiciary Act authorized *each* of the federal courts respectively "to make and establish all necessary rules for the orderly conducting business in the said courts, provided such rules are not repugnant to the laws of the United States";<sup>213</sup> and it gave the Supreme Court *no* supervisory role in this regard. Apart from its scant writ of error competence, the Supreme Court's only authority over other federal courts consisted of a power to issue writs of prohibition to district courts in admiralty and maritime matters,<sup>214</sup> a power to issue writs of mandamus to any federal court "in cases warranted by the principles and usages of law,"<sup>215</sup> and a power to schedule special sessions of the circuit courts for the trial of criminal causes.<sup>216</sup>

Indeed, the Justices rarely would meet together.<sup>217</sup> To sit as the "supreme" court on original matters or to consider eligible writs of error<sup>218</sup> was distinctly

---

6,729 cases between 1790 and 1801. *Id.* at 134. The discrepancy of 167 cases is not explained.

Page by page examination of West's thirty volume compendium, *Federal Cases* (which reprints all of the then known published and previously unpublished decisions of all federal courts antedating 1880), discloses only about eighty circuit court opinions (and far fewer district court opinions) for the period through 1801. This represents only about one percent of the work load that Henderson attributes to the circuit courts for that period. Probably many written opinions have been lost; but the federal courts at that time disposed of most matters without written opinions. For example, "[i]t was, indeed, the practice of the late chief justice [John Marshall, when sitting at Circuit], to commit his opinions to writing, only in cases of real difficulty." 1 J. BROCKENBROUGH, *BROCKENBROUGH'S REPORTS* (1837), reprinted in 30 F. Cas. 1265, 1266 (1897) (preface from volume one of reports of cases decided by Marshall in the Fourth Circuit, 1802-1833).

213. Judiciary Act, *supra* note 28, § 17.

214. *Id.* § 13.

215. *Id.* All of the federal courts were given "power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute." *Id.* § 14. Such "other writs" could be issued only as "agreeable to the principles and usages of law," and insofar as might be "necessary for the exercise of their respective jurisdictions." *Id.*

As to the Supreme Court's power to issue mandamus to inferior federal courts, see *Lawrence*, 3 U.S. (3 Dall.) 42.

216. Judiciary Act, *supra* note 28, § 5.

217. Section one of the Judiciary Act provided for two sessions of the Supreme Court each year. *Id.* § 1. In 1802 this was reduced to one term each year. Act of Apr. 29, 1802, ch. 31, § 1, 2 Stat. 156.

Among the earliest Justices only James Iredell chose to move his family and home to the seat of the national government; the others kept their several residences dispersed as they had been prior to their respective appointments, reinforcing the image of the Supreme Court as merely an occasional tribunal called together briefly for its semi-annual terms.

218. Even when they sat as a body on a case, the Justices ordinarily delivered separate opinions *seriatim*—a practice which, while paralleling the English practice, also served to confirm the image of them as several individual judges drawn from their separate principal

their secondary task. Most of their time and energy would be used traveling and sitting at the twenty-two circuit court sessions each year,<sup>219</sup> where they sat as trial judges and to review some district court proceedings.

Even the number of Justices was determined with reference to their principal function of staffing the circuit system: The number was set at six to provide two Justices for each of the three circuits originally prescribed.<sup>220</sup> Had it been conceived that the Supreme Court should "superintend and govern all others" in order to prevent the "distractions" resulting from "different and even contradictory rules of decision," as James Wilson counseled,<sup>221</sup> it would have been strange to compose it of an even number, manifestly inviting ties. Moreover, had it been conceived that this Court should serve as authoritative oracle on recurring issues, rather than simply as one of several arbiters of particular disputes, some means surely would have been provided to inform other courts and members of the legal profession of its rulings; but none was.<sup>222</sup>

## X. CONCLUDING PROSPECTUS

Not everyone was happy with the non-pyramidal structure ordained by the Judiciary Act: Throughout the first decade under the new Constitution

---

responsibilities to dispose of particular matters—more like an occasional congregation of judges than an integrated tribunal of ultimate resort. In substance, the Supreme Court originally resembled more closely the English Court of Exchequer Chamber or Virginia's Court of Appeals than the apex of a pyramided judiciary.

219. The district courts in the Maine and Kentucky districts were given a circuit court's cognizance, except for writs of error and appeals. Judiciary Act, *supra* note 28, § 10. The remaining eleven districts created by the Judiciary Act were arranged into three circuits: four districts comprised the Eastern, five districts the Middle and two districts the Southern Circuit. *Id.* § 4. A circuit court was to be held twice annually in each of the districts comprising each circuit. *Id.* Each circuit court was to consist of two Justices together with the district judge of the district in which the particular session of the circuit court convened; two of the three made a quorum.

220. *Id.* §§ 1, 4.

221. See *supra* text accompanying note 25.

222. The Justices sitting on their respective circuits might remember any collective discussions on questions which later recurred, but lawyers and other judges had no reliable way of learning what might have been decided by the Justices as a group as no provision was made for reporting decisions.

Entrepreneurs were slow to supply the deficiency. Alexander Dallas' first volume of reports (although later denominated volume 1 of the *United States Reports*) contains no report of any federal court case. His second volume, which contains a few pages reporting proceedings at the Supreme Court's Terms from February 1790 through August 1793, was not published until 1798. Dallas' third volume, reporting on the Terms from February 1794 through February 1799, was published in the middle of the latter year. His fourth volume reports Supreme Court cases only from the August Term, 1799, and the February and August Terms, 1800, and was not published until 1807. No reports were published of the February Term, 1801. William Cranch's first volume reports the August 1801, December 1801 and February 1803 Terms, and was first published in mid-1804.

there was talk of judicial reform. Yet never in that decade was the federal judiciary made pyramidal, as Justice Wilson in his lectures had urged.<sup>223</sup>

At the opening of the Sixth Congress in December, 1799, President Adams suggested in general terms that the judicial system be revised. Ironically, however, it was only after the waning of Federalist power that changes of long-term significance appeared. The sweeping overhaul enacted in 1801 was repealed the next year; but soon afterwards—under Jefferson—important piecemeal modifications were made. Each of those modifications was modest by itself; but together—and in combination with certain non-statutory developments—they gradually changed the federal judiciary into a pyramidal structure.<sup>224</sup>

As this pyramidalization progressed, it converged with other developments to produce, incrementally, an institution of government which it is unlikely anyone at the founding intended or even conceived, and which never has been placed before “we the people” of *any* generation to choose. One of those other developments—facilitated (but certainly not necessitated) by the appearance of published case reports (at first irregular, occasional and tardy, then more routine and timely, and eventually “official”)—was the insinuation into *constitutional* jurisprudence of the *common law* lawyers’ habit of *stare decisis*.<sup>225</sup> Another, more abrupt development was the displacement of the old Blackstonean vision of law and judicial process by a consciously instrumentalist purpose and style. The latter was brought to the Supreme Court by the politics and more so by the personalities of President Jackson’s Supreme Court appointees.

These developments could have been foreseen by few, if any, of those who had urged pyramidalization in order to mitigate the embarrassment of divergent opinions which had disconcerted lawyers’ compulsively ordered

---

223. It would be enlightening to describe how the original non-hierarchical, non-authoritarian federal judiciary operated in practice, to identify some points of early professional dissatisfaction and political discussion and to recount the early and unsuccessful proposals for change. To do so, however, even in modest detail, requires an additional article or two, and therefore is not attempted here.

224. Like the dissatisfactions with the Judiciary Act, the changes adumbrated in this paragraph require much greater elaboration and documentation than can be attempted here.

225. Notwithstanding the adamant and relatively early voice of Joseph Story, *stare decisis* has no proper place in constitutional law. Judges are bound by oath and conscience to support “this Constitution,” not some predecessor’s understanding (or misunderstanding) of it, and still less some vision of what they think it should be. *Stare decisis* merely perpetuates confusion unless the precedent relied upon is sound. In its earliest years, the Supreme Court cited its own prior holdings not as precedents in the common law sense, but to spare the trouble of reiterating sound analyses to which the Justices still subscribed. It was a kind of shorthand, not an ascription of authoritativeness. This seems to me still the only proper way to use “precedent” in discussions of constitutional law. The *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), view of the necessary and proper clause, for example, survives (with periodic aberrations and frequent misapplications) not on the “authority” of that or any other case, but because it—and no alternative view considered—makes good sense considered in the light of the text as a whole.

minds. Thomas Jefferson, who signed into law the handful of statutory measures that contributed to pyramidization, certainly expected independent judges to enforce constitutional limits on governmental action.<sup>226</sup> However, Jefferson could hardly have anticipated consciously creative lawmaking by unelected jurists using hierarchical primacy to implement through *stare decisis* their collective visions—apt or ill—of social utility, morality or public policy under the aegis of the Constitution.<sup>227</sup>

Precedents are important whether "authoritative" or not: Judges and lawyers in both state and federal courts routinely persuade with cases from other jurisdictions. And a righteous desire to do justice often justifiably impels decisionmakers (legislators, executive officials and jurors as well as judges) to creatively adjust, adapt or temper "the law." Only the Supreme Court's hierarchical primacy in a pyramided judicial structure has enabled these phenomena to accrete enormous political power in its hands. It is the *combination* of instrumentalist jurisprudence and the habit of *stare decisis* with hierarchical primacy that has produced the judicial authoritarianism we witness now, which scholars strive vainly to reconcile with the republican premises of our Constitution.

*Marbury v. Madison*<sup>228</sup> was decided when the pyramiding process had barely begun. Writing for the Court after spending much of a year pondering the 1802 congressional debates on the judiciary's role, John Marshall had no vision of the Supreme Court as authoritative oracle of the Constitution. Elsewhere, in fact, he expressly repudiated that notion.<sup>229</sup> And in any event, the pyramided structure prerequisite to such Supreme Court "authoritativeness" simply did not exist at that time. The situation in which and to which *Marbury* spoke was one that allowed one or another federal court to dispose of all<sup>230</sup> constitutionally contemplated *cases* with finality but did not—and because of the judiciary's design, ordinarily could not—even pretend to give "final," authoritative answers to any constitutional *questions* those cases might present.

The aim of this Article has been to free its readers' imaginations by demonstrating that the hierarchical design of the judicial department taken for granted today is not the design with which our federal history began,

226. That, he urged James Madison, was a good reason for adding amendments to the Constitution to constitute a "bill of rights." Letter from Thomas Jefferson to James Madison (Mar. 15, 1789), reprinted in 1 B. SCHWARTZ, *supra* note 96, at 620.

227. Many years later, when he suspected (incorrectly) that the Justices were deciding cases by political lights, Jefferson, the admirer of strong, independent judges, countered with bitter, unrelenting attacks. See, e.g., 1 C. WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 652-85 (rev. ed. 1987).

228. 5 U.S. (1 Cranch) 137 (1803).

229. See, e.g., 10 ANNALS OF CONG. 606-15 (1802). More elaborate documentation of Marshall's distinctly *Jeffersonian* concept of what we today call "judicial review" requires a separate article.

230. Yes all, at least virtually all. See Engdahl, *supra* note 181.



and is by no means what the text of the Constitution requires. We need not reinforce the Supreme Court's enormous political power by shamelessly politicizing the selection of its members. The same legislative branch that pyramided the judiciary may refashion it however political wisdom<sup>231</sup> directs, without doing violence to the Constitution.<sup>232</sup>

To be sure, before any possible alternate scheme is implemented there should be sober reflection and extensive debate—not only by scholars but also by practitioners, both of law and of politics, and also by the public whose interests the several foregoing should serve. Therefore, hoping to incite more ruminations than fulminations, I offer some preliminary thoughts of my own.

## XI. JURISPRUDENTIAL EPILOGUE

Most of the recurring uproar over Supreme Court "activism," whether from the "left" or the "right," is excited by rulings on issues of constitutional right. The text of the Constitution itself, including the amendments, actually says very little about rights; yet from the outset the federal courts considered, and sometimes deemed of "constitutional" status, various claims of "fundamental" right. Like most of our earliest Justices, I firmly *reject* any limitation of "constitutional rights" to those somehow adumbrated by constitutional text.<sup>233</sup>

Considerable mischief has ensued from the misguided, almost fraudulent, but familiar judicial distortions of such textual provisions as the first amendment and the due process and equal protection clauses. By wrenching these words to unsuited applications, Justices have elided much of the

---

231. Or foolishness.

232. There is but one restraint on congressional restructuring of the judiciary: *All* cases within the scope of article III must be left at least *one* federal forum in which they may at least end, if not (as is required only for those cases so inappropriate for state courts that commencement even in the "supreme" court was countenanced) begin.

Although mandatorily directed to vest all of the subject matter jurisdiction contemplated by article III, Congress had the raw power to disobey. That the Constitution requires Congress to vest does not mean that jurisdiction would vest automatically despite Congress' disobedience. But if the vesting is mandated, then once Congress has vested a particular element of what article III contemplates, Congress is incompetent to *divest*. Any fraction of what article III contemplates may be shunted anywhere within the federal judicial system, but none may be utterly taken away.

233. In this view, for whatever the company is worth, I stand with most of the framers, as well as with others from early generations. *Pennoy v. Neff*, 95 U.S. 714 (1877), to seize an easy example, rests on a point of "fundamental" right, *id.* at 722-24, for which the Court found the terms of the after-the-fact fourteenth amendment merely a convenient new referent. *Id.* at 733.

meaning apparent on the face of the text.<sup>234</sup> The most beneficent of these jurisprudential (de)feats have achieved nothing more than could have been accomplished—in some instances much earlier—by elaboration and application in new social contexts of the impulses for freedom and fairness recurrent in history (and not peculiar to our own<sup>235</sup>). Equality, for example, was a theme of "constitutional" stature from our outset,<sup>236</sup> even though many ramifications remained unexplored and in half of the country some obvious implications were egregiously ignored. Until the disastrous *Slaughterhouse Cases*,<sup>237</sup> this equality theme was beginning to receive new judicial attention under the impetus of the fourteenth amendment<sup>238</sup>—albeit not at all because of that amendment's "protection" clause, now so lamentably and unsuitably warped to do service in that cause.

These impulses toward freedom and fairness arise less from the cerebrum than from the deeper core of the brain. They reflect only incompletely and coincidentally in the Bill of Rights and other bits of constitutional text. They are spontaneous, irrepressible manifestations of the human spirit, which sooner or later will topple any tyrant. They can be reduced neither to an exhaustive nor to a timeless list. In this legacy not only of the American cultures, but of all humanity's, we have a noble heritage of *unwritten* fundamental (ergo "constitutional," ergo judicially enforceable) rights. Any attempt at limitation to certain "enumerated" constitutional rights I find unhistorical, intolerable and (quite incidentally) irreconcilable with the ninth amendment.

---

234. For example, "Congress" is twisted to mean any government level, branch, agency, instrumentality or official and consequently "no law" means not very many government actions. "Protection of the laws" is shorn of its safeguarding, nurturing connotations and made a euphemism for everything, and consequently "equal" means different but within some parameters (which vary according to whose ox is gored). Giving "protection" too broad a meaning has diffused any content as to which "nor deny" might be understood (as originally it was) to outlaw passive failure to provide; for we cannot infer an affirmative duty to bestow every benefit that might be conceived (as distinguished from the security and mechanisms for redress that are requisite to an organized society). In sum, the "contracts" and "takings" clauses are not the only ones debilitated by disingenuous, or just plain willful, judicial (re)construction.

235. See, e.g., *International Covenant on Civil and Political Rights*, G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966) (part of the so-called "International Bill of Rights").

236. Recall, for example, the strong public sentiment during our revolutionary era against monopolies, emoluments and special privileges.

237. 83 U.S. (16 Wall.) 36 (1873).

238. See, e.g., *Live-Stock Dealers' & Butchers' Ass'n v. Crescent City Live-Stock Landing & Slaughter-House Co.*, 15 F. Cas. 649 (C.C.D. La. 1870) (No. 8,408). The same "privileges and immunities" clause of the fourteenth amendment thus taken to import an equality guaranty was also taken to guarantee "the right of freedom of speech, and the right peaceably to assemble." *United States v. Hall*, 26 F. Cas. 79 (C.C.S.D. Ala. 1871) (No. 15,282) (also summarized under misnomer *United States v. Mall*, 26 F. Cas. 1147 (C.C.S.D. Ala. 1871) (No. 15,712)).

Sharply in contrast to prevailing "conservative" orthodoxy, I even reject limitation to such rights as, while not textualized, evidently were contemplated by the framers.<sup>239</sup> They are all dead; but we are alive, and we ought not resort to museums and archives to ascertain what is "fundamental" in our time.

On the other hand, however, I reject the "liberal" wing of orthodox thought by denying that we need—or ought to endure—any pretender to a role of authoritative arbiter of what our "fundamental" rights are, or what trenches upon them. Any *definitive* explication of fundamental rights, or of how they apply, inevitably must demark, delimit and thus confine collective human hope, aspiration and will. Fearless and independent judicial enforcement our fundamental rights assuredly do need; but authoritative exposition—and *thus circumscription*—they just as assuredly do *not* need. They are best candidly left for continuous, instantial forensic exploration and application. The driving wish behind our revolution, and later our Constitution, was that the people should be securely "free"; we ought not suffer a "supreme" court now to bind us with *its* chains.

Jefferson and his associates had some impractical ideas, and predominantly I incline toward Hamilton; but the Jeffersonians had a very good point when they argued for *jury* determination of the *constitutionality* of the Sedition Act. Perhaps one could not win acquittal for every scurrilous publisher; but success even in one case could be as significant as Zenger's<sup>240</sup> (for example)—even if "only" the community at large, or posterity, and not any judge of the incumbent, transient establishment, were convinced.

Candidly countenancing divergent outcomes on claims of constitutional right would not, it seems to me, make the courts seem more political. On the contrary, it would let them appear amenable to reasoned moral persuasion instead of chained by an overlord tribunal with its own—to some alien, and to all plainly political—value scheme. If there is fear that differences of outcome on some issue might make the courts less credible, that is reason

---

239. There are some rights provisions contained in several of the original *state* constitutions or declarations of rights (the enormous variation among which is itself worth considerable contemplation) that have no explicit counterpart in the Federal Constitution or Bill of Rights, but which one could not credibly pretend the framers intended to negate by omission. Guarantees against executive suspension of laws, of strict subordination of military to civil power and against using the military to execute the laws among civilians are examples—unless these are subsumed in the broader concept, "due process of law," as I have elsewhere argued.

240. John Peter Zenger was a New York printer prosecuted under the common law against seditious libel in 1735 for printing articles critical of the Colony's Royal Governor. Zenger's counsel, having lost to the presiding Chief Justice the legal argument critical to his defense, persisted with it to the jury, persuading them to disregard the judicial opinion. J. ALEXANDER, *A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER* (S. Katz ed. 1963). While some risk of them remained to test publicists' mettle, Zenger's celebrated acquittal seems to have marked the end of such prosecutions in colonial America.

not to coerce decisional uniformity one way or another, but rather to back off from any judicial address of the issue, leaving it to the political arena.<sup>241</sup>

Some who applaud judicial activism of the Warren and Brennan type characterize the Supreme Court as the national conscience and a promoter of social good. But the evidence is persuasive that, were it not for this institution, those who rallied to these moral and social causes more than a century ago might have succeeded, for example, in stamping out racial discrimination even before public education and urban population concentrations had reached their modern stages, with discrimination so insinuated ("systemic," it is said) as to make the difficulties of eliminating it far, far more severe. *Brown v. Board of Education*<sup>242</sup> and its progeny, if terrible as models for legal reasoning, were dreadfully overdue undoings of the Supreme Court's own inexcusable faults. It is dangerous to rest hope in an institution whose virtue depends on the values of its transient, but life tenured, incumbents.

I incline to agree with Professor Conkle that "America [and, I would optimistically add, all of mankind] is on a general course of positive moral development concerning individual rights,"<sup>243</sup> notwithstanding multitudinous, egregious backslides. But I maintain an historically warranted faith that what is indeed fundamental will achieve prevalent recognition in time, without the aid even of such a "provisionally" authoritative role for the Supreme Court as Conkle describes.

Indeed, I think that any "progressive function"<sup>244</sup> the Supreme Court might serve is encumbered by attributing to its moral edicts any special authority. Shrill calls for final answers resound the pitch of partisan fervor—the strength of conviction that others must think like oneself. But it contradicts the most fundamental of values to dictate uniformity while storms of controversy rage. Presuming authoritatively to "settle," even "provisionally," those questions on which opinion is bitterly split serves only to increase the fury that surrounds them.<sup>245</sup> It casts the Supreme Court

---

241. If abortion, for example, severely splits opinion, the one thing *worse* than letting courts go both ways is to pretend that *anybody* has any business telling them all to go *one* way—or the other! This is a major *political* dispute—a contest between *assertions* of right, and not a vindication of established rights at all! I am emphatically pro-choice, and (although male) I resent governmental efforts to "protect the unborn." I also believe very strongly that what adults do voluntarily in private is none of the government's business. But these are *political* opinions, and I think that all one is entitled to do with such political opinions in a judicial context is to try to persuade the jury or judge *in a particular case* that the point is one of fundamental right. And then try again in the next particular case. And in the next. And the next. Over the course of time the proposition will stand or fall on the appeal of its merits—as it should—and not on some higher-ups' say-so.

242. 347 U.S. 483 (1954).

243. See Conkle, *supra* note 5, at 25.

244. See *id.* at 24-26, 31.

245. I disagree with Professor Conkle's proposition that even when no "pattern of American

not as "moral teacher" but (viewed from one side or the other of a controversy) as an instrument for imposing one's own will or as a despised false pretender to truth.

There are moral points on which not merely national, but *world* agreement is urgent today; but what folly it would be to think some group of wise elders therefore competent to impose it, or entitled even to try! The case for uniformity is stronger today than before—but *so* strong that, where it really matters, it simply *will occur*, without being dictated by anyone. There are lessons we can learn by observing that grander stage, where diplomats work such issues as we delude ourselves are best put in litigators' hands! Certainly the International Bill of Rights is very imperfectly realized; but its realization, like its conceptualization, will come, if at all, through political, not judicial, events.

Rather different considerations apply with respect to structural, or "organic," constitutional issues, such as those concerning federalism and the separation of powers. (Whether a judicial hierarchy must exist is, of course, one such "organic" question.)

Here, the text of our written Constitution is the critical point of reference. The Americans of the late eighteenth century had a revolutionary idea: It would be useful to organize governments according to a verbally articulated design, rather than letting them evolve as the social customs of a people (and the wishes of society's more powerful or assertive elements) might change.<sup>246</sup> On organic questions, therefore, to neglect or abuse the text is to waste a great contribution to the art and science of politics.

Taking the text as common ground, and permitting alteration only by deliberate, extraordinary, non-judicial political action, can spare the nation the embarrassment (and paralysis) it might suffer if each generation were left to play political craftsman from scratch: Any dozen might conjure a score of opinions on "institutional competence" or political "balance," and a hundred visions of what the nation's political structure should be.

---

moral development" on a particular point has emerged, the "need for a national resolution" remains. *Id.* at 29. I think it makes no difference whether there are local conditions *justifying* disagreement; it is enough that profound disagreement exists. Any attempt to *impose* a national resolution (however progressive and humane it might be) is likely to backfire. To the extent that a progressive view has yet to work its way up from the roots, its imposition from above is more likely to provoke resentment and reaction than beneficent change.

246. For some time now it has been the fashion to emphasize society's "changing needs." Perhaps our "revolution" was in vain after all: Perhaps government inescapably is a matter of *volksgeist*, not susceptible to choice or deliberate shaping. Perhaps the dream of "written" constitutions was sheer fancy—too quaint a rationalist "enlightenment" fantasy to survive in the real world of harsh romanticist fact. How silly to imagine that a governance structure might be kept in place unless and until deliberately amended! What a vanity is article V!

Is it not ironic that the once revolutionary idea of a *written* constitution—a basic organic text—now is most derisively scoffed by those who consider themselves the more enlightened, the more rational, the more "liberal"?

To be sure, the text leaves some room for disagreement; but on most *organic* issues the text is sufficient that—if it is approached candidly as a coherent, comprehensible whole, if critical thought is employed and if any interests or biases are exposed—agreement tends to distill from open debate. Consequently, although practice might deviate under transient political pressures time and time again, opinion tends repeatedly to return toward a discernible “center of gravity” of organic concepts embedded in the text.<sup>247</sup>

Where that does not occur, the persistent disagreement becomes part of the rhetoric and competition of wills comprising our scheme of checked and balanced, separated powers divided between levels of government—a constant dynamic which we lawyers, with our passion for certainty and order, should not be suffered to destroy.

The reference point is the text, and not the intent, for some framers and ratifiers might have failed to grasp the words’ import, and in some respects they might have built better than they knew.

The benefits of a written constitution cannot be realized, however, if instead of building from the text itself one builds organic doctrine from the crooked stones of judicial precedent.<sup>248</sup> Case opinions, like snapshots, freeze the rhetorical process at whatever stage of understanding the writer exhibits at one moment in time. Judicial, no less than other human minds, have a wondrous and frustrating tendency—attributable variously to weakness, impatience, preoccupation, unconcern, sloth and a host of other causes—to misapprehend, misstate, misapply and confuse. Consequently, few snapshots of the rhetorical flow hither and yon about the organic doctrinal center of gravity provide reasonably clear pictures of that conceptual core.

My empirical assessment is that the life of organic constitutional case law has been neither logic nor experience, nor even will, but rather, inept analysis and mental confusion.<sup>249</sup> Lawyers (including Justices and professors)

---

247. This I sought in some measure to demonstrate in my mini-treatise masquerading as a “nutshell.” D. ENGAHL, *CONSTITUTIONAL FEDERALISM* (2d ed. 1987).

248. As I stated in an earlier article:

The Constitution is an integrated intellectual construct; and untoward consequences can result from application of one or another of its provisions in isolation without attention to the conceptual structure as a whole. Today’s decision of what seems an isolated question might tomorrow work mischief as precedent in an unanticipated quarter; distortions can be caused in a far corner of the fabric by the pulling of some seemingly unconnected thread. . . Only by careful attention to analysis and theory can the practical operating system of liberty and republican government effectively be maintained; for the advantage of a written constitution, if properly designed and used, is precisely that it does establish an integrated and coherent set of abstract concepts, to be modified only through extraordinary deliberation, against which government responses to empiric exigencies can be tested, and by application of which the hand of force can be restrained.

Engdahl, *Sense and Nonsense About State Immunity*, 2 CONST. COMM. 93, 122 n.118 (1985).

249. In my “nutshell,” D. ENGAHL, *supra* note 247, I tried to penetrate the confusion, expose the mistakes and improve the analysis.

typically have done such poor work in this realm that intelligent policy deliberation and choice have been foreclosed by uncritical word usage and pervasive confusion over the concepts involved. Great concentrations of power at the center have been accomplished, for the most part without informed and deliberate choice even by some Justices materially contributing to the change.<sup>250</sup>

"Holistic textualism" is the criterion of organic constitutional law. Cases might illustrate the concepts involved, but the opinions deciding them are neither indispensable nor necessarily conducive to understanding them. Hierarchically "final" judicial authority, moreover, is positively dysfunctional. To the extent that any Supreme Court opinion exhibits accurate apprehension of the gravitational core of organic concepts, it might illuminate those concepts and their application but it adds no substance that was not there before. On the other hand, to the extent that any opinion mistakes or misstates those concepts (as most often has occurred in varying degrees heretofore), it is yet another photo of steps off the trail, apt to lead the unwary reader astray.

Although for different reasons, neither the law of constitutional rights nor organic constitutional law can safely be trusted to a small set of minds, however large those minds might be. Never has there been a deliberate choice by our people to do so; indeed, the only generation ever offered such a choice, the first, chose not to. Even when the early steps were taken to pyramid the federal judiciary, it was not with anything like this result in mind. The judicial authoritarianism that we have today is a legacy of default. An article like this can throw light on the situation; it would take somewhat more to bring about change.

---

250. I was amused by the title of a 1987 AALS seminar panel, "Was the Revolution of 1937 a Mistake?" I should rather have asked, was the "revolution" of 1937 a fact? It was not, as the "revolution" came slowly by slips of reason over the years that followed.

Recall that *Ernie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), the quintessential "enumerated powers" case, was decided in 1938, and note the alignment of the Justices in that case! And remember that the majority had to eviscerate the NLRA and distort it into something quite different than Congress had enacted in order at first to sustain it in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). Only gradually thereafter did the mainline principles, which had been beclouded for some time before, emerge from the haze still hovering in the *Jones & Laughlin* opinion.

And then only a few short years passed before the clouds of confusion descended once again. Brennan went off in the dark pursuing the spectral "twin aims of *Ernie*," unwilling to believe that so fine a judge as Brandeis could have been serious about the doctrine of enumerated powers; and instead of illustrations of classic "necessary and proper" clause doctrine, cases like *Jones & Laughlin* were taken as "commerce" clause cases and hatched a gaggle of misfit opinions (and a whole lot of jokes) about "activities affecting interstate commerce."